IN THE GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

14/8/2014 .....

DATE SIGNATURE

Case No.: 6871/2013

In the matter between:

FAM Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS Second Respondent

REFUGEE STATUS DETERMINATION OFFICER, MOTHUSI CLIFF N.O., DURBAN RECEPTION OFFICE Third Respondent

STANDING COMMITTEE FOR REFUGEE AFFAIRS Fourth Respondent

JUDGMENT

KEIGHTLEY AJ

INTRODUCTION

[1] The applicant in this matter is an asylum seeker from Ethiopia. In 2008 she applied for asylum in terms of the Refugees Act 130 of 1998 ("the Act"). The third respondent, who was the Refugee Status Determination Officer ("RSDO") seized with her application, rejected it on 11 November 2009 as being "manifestly unfounded" in terms of section 24(3)(b) of the Act.

[2] The fourth respondent, the Standing Committee on Refugee Affairs ("SCRA"), reviewed the third respondent's decision in terms of section 25(1) of the Act. The fourth respondent upheld the third respondent's decision on 20 September 2010. The SCRA's decision was communicated to the applicant on 23 February 2011.

[3] For ease of reference, I refer to the third respondent and the fourth respondent as "the RSDO" and "the SCRA" respectively. I refer to the Department of Home Affairs as "the Department".

[4] The applicant applies to review and set aside both the decision by the RSDO to reject her application for asylum ("the RSDO's decision"), and the decision by the SCRA to uphold that rejection ("the SCRA's decision"). The basis for her review, in respect of which I will deal in more detail later, comprises procedural and substantive grounds. It is common cause that this is a review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[5] Apart from a review and setting aside of both decisions, the applicant seeks the following additional relief:

[5.1] Condonation for the filing of the application outside of the 180-day limit prescribed in section 7(1) of PAJA;

[5.2] The striking out of certain paragraphs from the answering affidavit of the Chairperson of the SCRA, Mr Sloth-Nielsen, ("the Chairperson") as well as the striking out of annexure A to that affidavit ("the strike out application");

[5.3] An order substituting the decision to refuse the applicant refugee status with a decision recognising the applicant as a refugee ("the prayer for substitution");

[5.4] Alternatively, an order remitting the matter to the SCRA under such directions as the court deems reasonable;

[5.5] In the event of the court ordering a remittal of the matter, a direction to the second respondent to issue the applicant with a temporary asylum seeking permit in terms of section 22 of the Act;

[5.6] An order directing the transfer of the applicant's file from the Durban Refugee Reception Office to the Tshwane Interim Refugee Reception Centre, with all relevant permits to be issued out of that office;

[5.7] Costs of the application.

[6] The applicant initially also sought relief in the form of certain prayers to ensure that her name and identity be kept private and confidential and not be disclosed in public. However, counsel for the applicant, Ms Dyanand-Jugroop, indicated at the hearing of the matter that the applicant would not persist with this relief. Accordingly, I make no order to this effect, although in consequence of the initial prayer, the applicant is still cited by her initials, rather than her full names.

[7] It is not clear from the record before me which of the respondents opposes the application. In his answering affidavit the Chairperson does not indicate whether he opposes the application on behalf of all of the applicants or only on behalf of the fourth respondent. I shall assume that the relief sought by the applicant is opposed by all of the respondents.

THE RELEVANT FACTS

[8] In view of the nature of the relief sought by the applicant, which includes a prayer condoning the late institution of her review application, and the prayer for substitution, it is necessary for me to traverse the facts of the case in a fair amount of detail.

[9] The applicant states in her founding affidavit that she was born on 30 November 1986 in Zala Ambasa, Ethiopia, which is a village near the Ethiopian border with Eritrea. Her mother was an ethnic Eritrean, and her father was Ethiopian.

[10] In about 1998 or 1999, when the applicant was still a child, her mother was expelled from Ethiopia to Eritrea. This event occurred during the

Ethiopian/Eritrean war, and was a fate inflicted on many Ethiopians who were ethnically Eritrean. The applicant lost all contact with her mother as a result of this event.

[11] During the same war, and at some time between 1998 and 2000, Eritrean soldiers raided the applicant's town. They shot her father and other family members, took all the family's money and furniture and burned down the family's grain store, which was their livelihood. The applicant was physically and sexually assaulted by the soldiers, and lost consciousness.

[12] She was found by her cousin, Adgo, who subsequently took the applicant with him to Addis Ababa. She and her cousin feared for their safety if they remained in the village.

[13] While in Addis Ababa, the applicant's cousin enrolled her in a technical college for a two-month short course, as this provided food and accommodation. On the applicant's version, she would have been between 12 and 14 years of age at this time. While the applicant was in the technical college she witnessed soldiers from the Eritrean People's Revolutionary Democratic Front, the EPRDF, forcing students to join them, and arresting, beating and even shooting those who refused. She feared for her life.

[14] The applicant and her cousin were fearful of being identified as ethnically Eritrean if they remained in Ethiopia. She feared being expelled to Eritrea and, if so expelled, she feared persecution there in view of her father being Ethiopian. Consequently, after about three months in Addis Ababa, the

applicant and her cousin fled to Kenya, where they stayed with a family friend, Mr Astebha. This was in about 2001.

[15] According to the applicant, she and her cousin continued to feel unsafe in Kenya in view of its proximity to Ethiopia and the Kenyan government's practice of deporting Eritreans and Ethiopians back to their countries. As a result, over the next few years, the applicant and her cousin moved from Kenya, to Burundi, to Tanzania and to Mozambique, before she entered South Africa in 2006.

[16] The applicant deposes to the fact that her native language is Tigrinya, and not Amharic, which is the official language of Ethiopia. In addition, Ethiopia does not follow the Gregorian or Western calendar. The Ethiopian calendar is very different and is seven to eight years behind the Gregorian calendar. As a result, the applicant states that it is difficult for her to remember and recount the precise dates of the events that happened to her, not only because she was a child at the time, but also because of the differences in the two calendars.

[17] The applicant entered South Africa from Mozambique on or about 17 March 2006. She was twenty years old at the time.

[18] On 27 March 2009, the applicant gave birth to a daughter in Johannesburg. She states that her daughter is dependent on her. The applicant has been unable to obtain a birth certificate for her daughter because she does not have a valid permit or identity document. The applicant indicates that she has been unable to register her child's birth with the Department of Home

Affairs, and that her daughter is currently stateless and undocumented. The respondents dispute this on the basis of an allegation by the Chairperson that state hospitals assist persons with Temporary Asylum Seeker Permits to register the births of their children. This is not substantiated in any way.

[19] As far as her own nationality is concerned, the applicant states that although she was an Ethiopian under the law that applied at the time of her birth, she never held any Ethiopian identity documents or birth certificate. Furthermore, as a result of changes to Ethiopian law, and more particularly the Ethiopian-Eritrean Claims Commission, which was established in December 2004, she subsequently discovered that she has now lost her Ethiopian nationality. She also indicates that she is unlikely to qualify for entry to Eritrea or to obtain Eritrean nationality. Even though her mother was Eritrean, she has never been there and has no relatives to vouch for any Eritrean ethnicity on her part. The applicant contends that she is likely to face persecution as a result of her ethnicity were she to be returned to either Ethiopia or Eritrea in view of her mixed ethnicity.

[20] The applicant applied for asylum at the Durban Refugee Reception Centre in 2008, and was granted a temporary asylum seeker permit in terms of section 22 of the Act, which she renewed from time to time. When she applied for asylum, she completed the application form known as a "BI-1590". She did not speak sufficient English at the time, and required translation assistance in filling in the form. After making inquiries at the Refugee Centre, she found someone who was willing to assist her to complete her application for a fee of R50.

[21] This person did not speak Tigrinya. He only spoke Amharic. However, there was no-one else available to assist her who spoke Tigrinya. She spoke some Amharic at the time, but her grasp of the language was not good. The applicant contends that this led to misunderstandings between her and the person who assisted her in completing the application form, and to inconsistencies in the form.

[22] These inconsistencies include her language being recorded as "Amharic" and her other languages as "Tigrigna" (sic). This despite the fact that her place of birth is recorded as "Tigray" and her ethnic group is recorded as "Tigre" (sic). The form also records the answer "Yes" in response to the question "Do you wish to return to your home country?" This appears to be inconsistent with the underlying purpose of asylum, which is to protect an applicant against a return to their country.

[23] In addition, the BI-1590 records as her reasons for applying for asylum as follows:

> "Because of political problems. She was a student in Addis Ababa technical college & the ruling party EPRDF was forcing the student to join and vote for EPRDF but the students were refused to join because EPRDF can't bring peace, democracy and human rights for the people. Then after they refused to join & vote for EPRDF soldiers came to the school and started to arrest the students and killed some of the students and she was badly beaten by the soldiers and they are still looking for her to arrest her because of that she decided to run away."

[24] The applicant points out that this differs from her version of events, in that she was not personally beaten by soldiers at the technical college, nor were the soldiers looking for her specifically. She had been a witness to these events, but not directly involved.

[25] On 11 November 2009, the applicant was interviewed by the RSDO at the Durban Refugee Reception Centre. On this occasion, unlike in her first interaction when she completed her application form, officials at the Refugee Reception Centre provided the applicant with the assistance of an interpreter. The translator was an Ethiopian, Mr Tesfayohannes, who was Amharic-speaking. The applicant deposes to the fact that departmental officials did not ask her whether she required an Amharic or Tigrinya interpreter. The respondents do not dispute this latter fact.

[26] Among the papers filed in support of the application is a document headed "RSDO Second Interview Notes". The notes appear to have been recorded by the RSDO. They are rather scant in nature, and take the form of a bullet point list of sentences and questions.

[27] In view of the issues in dispute between the parties, it is necessary to describe the notes in detail. They record the following:

[27.1] The applicant "left her country in 2007 after her father died as they were staying along Eritrea/Eth border."

[27.2] "Her mother (ERI) was deported to Eritrea in 1999. She stayed with her father (ETHIOPIAN)"

[27.3] "The father died in 1999 and she went to Addis Ababa and she was left alone."

[27.4] "Their property including shop/house and a grain store were burnt."

[27.5] "Spent 2 months in Addis Ababa. She then went to a family member in KENYA and stayed from 2001-2007, when she left for RSA."

[27.6] The form records that she attended school until 1995. It records negative answers to the questions: "Did you go to Tertiary/College?" and "Were you involved in political activities?"

[27.7] The notes record the following question: "In your first interview you claimed that you were wanted by EPRDF forces who came to school and beat and killed some students-EXPLAIN:" There is no recorded answer to this question.

[27.8] The following further question is recorded: "It was also claimed that you were a college student but you claim that you went up to Secondary level."

[27.9] And: "You also claimed that students did not believe that the EPRDF cannot bring peace/democracy and Human rights for the people – Can you explain all the above statements."

[27.10] The answer recorded against this is: "Had no place to stay after father died (suffering)."

[27.11] The answer recorded against the question as to why the applicant did not intend to return to Ethiopia was: "Because the mother is deported to Eritrea and Ethiopian father have passed away, had no place to stay."

[28] According to the applicant, towards the end of the interview, the RSDO told her that what was stated in her BI-1590 form regarding the reasons she fled from Ethiopia were not the same as what she told the second respondent in the interview. The applicant states that she told the RSDO that the interpreter who had assisted her with her application form in her initial interaction with officials at the Refugee Reception Centre did not understand her story, and that the information that she had provided now to the RSDO was the correct version.

[29] The applicant avers that after the interview, the interpreter asked her whether she had any money to give to the RSDO, but she told him that she didn't. Not surprisingly, the respondents deny this allegation.

[30] The RSDO's decision was conveyed to the applicant within thirty minutes of the interview having been completed. This is not disputed. As I have indicated, the RSDO's decision was to the effect that the applicant's application was rejected as "manifestly unfounded".

[31] On the original BI-1590 form, under the heading "For Office Use Only", the RSDO recorded his decision as follows: "Claim rejected as manifestly unfounded in terms of section 24(3)(b) of the Act. Applicant claimed different claim contrary to the claim in sec. 4(f) of the application form" (my emphasis). This form was not returned to the applicant.

[32] Instead, the RSDO handed the applicant a document recording his decision. As regards her claim, it states that:

> "In your application you claimed that you left your country in 2007 after your mother was deported to Eritrea as you were staying along the Eritrean border. The father passed away in 1999 and went to stay in Addis Ababa. The business and property were burnt and you went to Kenya in 2001 until 2007 when you came to RSA. You were not politically involved nor supported any party. You left as you had no shelter. You attended school up to secondary level. Not intended to return as you had no one to look after you."

[33] After setting out the relevant provisions of 3 of the Act, the document records the RSDO's "reasoning" as follows:

> "After careful consideration of your claim I have applied section 3 of the Act (sic) provides the grounds under which an application may be made as you left as there was noone (sic) to stay with after your mother was deported to Eritrea and your father passed away. Therefore your application is based on reasons that are not stipulated in the above mentioned section of the Act." (emphasis added)

[34] The document further records that "considering the above", the third respondent has rejected the application as manifestly unfounded. It bears noting at this point that the reasons provided for the rejection of the applicant's application that were given to her differs from the reasons recorded for office use on the BI-1590 form. I revert to the significance of this fact later.

[35] Together with this document, the third respondent provided the applicant with a notice regarding the automatic review process to which the RSDO's decision would be subjected. This notice advised the applicant, among other things, that: "If you wish to make representations to or request to appear before the SCRA as envisaged in (d) above prior to the review, you may do so in writing. Any such representations or request to appear before the SCRA must BE HANDED TO THE REFUGEE RECEPTION OFFICE not later than fourteen working days after the date on which you received the attached letter from the RSDO."

[36] The applicant was living in Johannesburg at the time. She returned to that city and, with the assistance of another translator, drafted written submissions in response to this notice. However, these were only completed on 11 December 2009, some ten days after the 14-day period referred to in the notice.

[37] It is unnecessary for me to record the full details of the applicant's representations here. Suffice to say that they highlighted the following:

[37.1] The applicant wished to appeal against the RSDO's decision.

[37.2] She was in South Africa as a result of problems with her nationality arising out of the fact that she was born of an Eritrean mother and Ethiopian father, and had lived on the border between the two countries.

[37.3] During the conflict between the two countries, her life changed. Eritreans crossed the border, killing many Tigrians in the area, including her father, because of his nationality. The Ethiopian authorities deported Eritreans to Eritrea, including her mother. They also tried to deport the applicant to Eritrea.

[37.4] The applicant could not go to Eritrea because she was Ethiopian, and she feared that she would suffer the same fate as her father. She left Ethiopia before she could be deported.

[38] For reasons that will become apparent, I will refer to these as the applicant's first written representations. The applicant avers that she tried on two occasions to file her first written representations, but the relevant officials would not physically accept them, and refused to stamp them to show that she had attempted to file them.

[39] The copy of the applicant's representations attached to her founding papers bears no indication that they were ever accepted by any official representing any of the respondents. It is also not disputed on the papers that the contents of the applicant's refugee file that her attorneys later obtained from the Durban Refugee Reception Office did not contain a copy of the applicant's representations. Nonetheless, the respondents dispute that they

refused to accept her representations. The Chairperson, who is the deponent to the respondents' answering affidavit, contends that the SCRA considered the representations before making its decision to uphold the RSDO's decision. I will deal with this issue in more detail later.

[40] On or about 15 March 2010, some four months after the RSDO's decision was made, he prepared a submission to the SCRA concerning his decision to reject the applicant's application. This submission includes the same recitation of facts contained in RSDO's record of decision that he gave to the applicant on 11 November 2009. Under "reasoning" the RSDO's submission to the SCRA records: "The applicants claim has been rejected because her application is made on grounds other than those an application maybe (sic) made under the Refugees Act 130 of 1998 section 3."

[41] These submissions were made on a BI-1691 form. At the end of this form a heading is included reading: "Decision of the Standing Committee UPHELD / REFERRED" followed by space for "COMMENTS", signature and date. A handwritten tick appears above the word "UPHELD" and the word "REFERRED" is crossed out. There are no comments made, and a signature appears at the end of the document without any indication of the name or designation of the signatory. A date stamp reflects 20 September 2010.

[42] It is common cause that the applicant was only informed on 23 February 2011, some 15 months after the RSDO's decision, of the SCRA's decision to uphold the rejection of her application. She was personally handed what appears to be a standard letter, advising her that the SCRA had confirmed

the RSDO's decision, that she had now exhausted her options in terms of the Act, and that she was not otherwise entitled to remain in South Africa. This letter is signed by the RSDO with a signature that appears to correspond with those appearing on earlier documents. There is no interpreter's signature on the letter to confirm that it had been translated to the applicant in a language understood by her, although the letter makes specific provision for this.

[43] It is common cause that the applicant was not provided with any reasons for the SCRA's decision, nor was she advised of her rights under PAJA to seek a review of that decision. No reasons for the SCRA's decision are included in the BI-1691 form, signed off by the SCRA. Indeed, even in the answering affidavit filed on behalf of the respondents, the SCRA does not provide reasons. On the contrary, its stance is that it is not lawfully obliged to provide the applicant with any reasons for its decision. I will deal with this aspect of the case in due course.

[44] On the 23 February 2011, the applicant also received a "Notice to Appear" before the Director General of immigration with an emergency travel document and to arrange to leave the country on or before 23 March 2011. The applicant did not do so. Instead, she approached the organisation ProBono.Org in Johannesburg for assistance. On 6 May 2011, the attorneys firm Deneys Reitz, as it then was, sent an urgent letter on the applicant's behalf to the Durban Refugee Reception Centre requesting a copy of the applicant's file in order that consideration could be given to the merits of a possible review application to the High Court.

[45] The applicant received no positive feedback in response to this letter. There is no indication in the papers before court that the Durban Refugee Reception Centre ever responded to the request.

[46] In the interim, the applicant had married a fellow Ethiopian, Mr Gizaw, in the Ethiopian Orthodox Tewahedo Church. The applicant states that this was a customary marriage. She approached new attorneys, Lawyers for Human Rights, who are the applicant's present attorneys of record and requested their assistance. Initially, she sought to have her file joined with that of her husband, who was a recognised refugee, on the basis that she was his dependent. From February 2012, Lawyers for Human Rights assisted the applicant in attempting to achieve this. However, she was told to travel to Durban to lodge a request for a file joinder there. Her relationship with her husband subsequently broke down and she could no longer rely on him as a dependent. Her attorneys then made written representations to the SCRA in an attempt to persuade it to reconsider its decision ("the applicant's second written representations"). These representations were substantial. However, the applicant accepts that the legislative framework does not permit the filing of further representations once the SCRA had made its decision. According to the applicant, her second representations were an attempt to reach an amicable settlement of her case without the need for litigation.

[47] The SCRA did not respond to the applicant's second written submissions. As a result, the applicant launched the present review application. She did so after a period of seventeen months had lapsed from the date when the SCRA's decision was communicated to her.

THE RESPONDENTS' DENIAL OF THE APPLICANT'S FACTUAL AVERMENTS AND THE APPLICATION TO STRIKE OUT

[48] The respondents dispute much of the applicant's version of events. Among other things, they dispute the applicant's personal history, detailed above, and the consequences for her of the events that took place in Ethiopia and Eritrea between 1998 and 2001. The respondents dispute that the applicant is a Tigrinya speaker and insist that her home language is Amharic. They dispute that the initial interpreter whom the applicant obtained to assist her in completing her refugee application form misrepresented the relevant facts as a result of language problems. They dispute that the applicant explained to the RSDO that this was the cause of inconsistencies between the initial application form and the information she gave at her interview with the RSDO. The respondents also dispute that they refused to accept the applicant's representations of the 15 December 2009, and state that these representations were taken into account in the SCRA's decision.

[49] Most of these disputes take the form of broad and general denials on the part of the respondents. It is a curious feature of the respondents' case that they do not place any first-hand evidence before the court to substantiate their denials of the applicant's averments. There is no affidavit from the RSDO. This is a significant absence, as he was the person responsible for interviewing the applicant, for recording his notes of the interview, and for making the original decision to refuse her application for asylum. Furthermore, as I have indicated, the deponent to the answering affidavit is the Chairperson of the SCRA. He claims in his affidavit that the facts deposed to fall within his personal knowledge. It goes without saying that

this cannot be so in respect of what occurred between the applicant and the RSDO.

[50] Furthermore, there is no evidence that the Chairperson was involved in the SCRA decision to uphold the RSDO's decision. He gives no indication that he was involved in making the decision. The signature appended to the BI-1691 form under the heading "Decision of the Standing Committee" is not that of the Chairperson. This is clearly evident from a comparison between that signature and the Chairperson's signature appended to the answering affidavit. There is no confirmatory affidavit from the official who was responsible for the decision of the SCRA. Indeed, the Chairperson does not even explain in his affidavit what process was followed leading up to the SCRA's decision. Not only is the court left in the dark as to how the SCRA's decision was made, or who made it, but once again, the Chairperson cannot claim, on the evidence before the court, to have personal knowledge of what informed this decision.

[51] In his answering affidavit, the Chairperson refers to a supporting affidavit from Mr Tesfayohannes, the interpreter who assisted during the RSDO's interview with the applicant. Strangely, although the Chairperson deposed to the answering affidavit on 31 July 2013, the supporting affidavit was not attached. In fact, Mr Tesfayohannes only deposed to his affidavit on 22 October 2013, and the affidavit was filed some four months after the answering affidavit. There is no explanation for this.

[52] In any event, Mr Tesfayohannes says only that it is clear from the third respondent's interview notes that the applicant was unable to deal with

inconsistencies, and that had she been able to do so, he would have translated this to the RSDO who "would have made a point of noting these". The affidavit is attested to four years after the interview took place. Not surprisingly, Mr Tesfayohannes does not state that he remembers well what took place at the interview. He bases his averments on the RSDO's notes. As with the Chairperson, Mr Tesfayohannes cannot speak for the RSDO. He cannot testify as to what the RSDO would have noted down in his interview notes.[1]

[53] The applicant's application to strike out is premised on the hearsay and scandalous nature of certain aspects of the Chairperson's affidavit. The applicant also seeks to strike out the supporting affidavit of Mr Tesfayohannes on the basis that it was filed out of time, and after the applicant had filed her replying affidavit. In my view, there may well be merit in the applicant seeking to strike out as inadmissible certain aspects of the answering affidavits, in particular, the hearsay evidence tendered by the Chairperson. However, in view of the decision that I have reached in the matter, it is not necessary for me to make a determination in this regard. I will proceed on the assumption that the evidence is admissible, bearing in mind, however, that the nature of the evidence inevitably will affect the weight I place on it in reaching my decision in the case.

[54] In addition, it is most inappropriate for a deponent holding the position that the Chairperson does to say in an affidavit that the applicant's earlier

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1 *Gerhardt v State President and Others* 1989 (2) SA 499 (T) at 504G; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 70

averment in her second written representation to the SCRA that she was raped was subsequently "downgraded ... to sexual assault" (my emphasis) in her founding affidavit. The Chairperson's statement implies that sexual assault is a lesser form of violation, and hence to be taken less seriously, than a sexual assault in the form of rape. Apart from the fact that, as the applicant points out, "sexual assault" is broad enough to cover rape, this type of comment flies in the face of the express recognition that our lawmakers have given to the seriousness of all forms of sexual assault, and to the particular vulnerability of women and children to sexual offences. I refer in this regard to the preamble to the Criminal Law (Sexual Offences Amendment) Act 32 of 2007, which spells this out in great detail. I trust that affidavits filed on behalf of representatives of any of the respondents in future proceedings will not contain gratuitous and derogatory comments of this nature.

THE CONDONATION APPLICATION

[55] The applicant applies for condonation for the fact that her application was instituted outside of the 180-day limit imposed in section 7(1) of PAJA.[2] Strictly speaking, it is not an application for condonation, but rather an application for an extension of the 180-day period in terms of section 9(1)(a) of PAJA, and it ought properly to have been framed in such terms.

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[2] Section 1 of PAJA provides that:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date ...(a) ... on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded ..."

[56] Be that as it may, the substance of the relief that is sought in this regard is clear. I must decide the issue on the basis of the interests of justice, as required by section 9(2).[3]

[57] It has been held that whether or not the interests of justice require the grant of an extension will depend on the relevant facts of each case.[4] Relevant factors in this regard include the following: whether the party seeking an extension has furnished a full and reasonable explanation for the delay, the nature of the relief that is sought, the extent and cause of the delay and its effect on the administration of justice, the effect of the delay on other parties and any prejudice in respect of them, the importance of the issues and the prospects of success.[5] It has also been held, in a case dealing with the common law on the question of delay in the institution of judicial review proceedings,[6] that the impact of refusing condonation on an applicant's right of access to the courts under section 34 of the Constitution is a relevant factor. So, too, is the significance of the rule of law as a founding value of the

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3 Section 9(2) of PAJA provides that:

> "The court or tribunal may grant an application (for an extension of the 180 day period fixed in section 9(1)) where the interests of justice so require." (my emphasis)

4 *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) at para 54.

5 *Camps Bay Ratepayers' and Residents' Association v Harrison*, above para 54. See also, *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) at para 3, and *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at paras 20 and 22. These cases are cited and discussed in C. Hoexter *Administrative Law in South Africa* (2ed), Juta, (2012) at p535-6, hereafter "Hoexter".

6 *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E)

Constitution in the sense that "courts should be particularly careful to allow as few invalid exercises of public power as possible to slip through the net".[7]

[58] It is common cause that the applicant filed her application for review 17 months after the SCRA's decision was communicated to her. However, it is also common cause that the SCRA never provided her with reasons for its decision, nor did it advise her of her right to ask for reasons or to seek judicial review of the decision. In fact, the letter advising her of the outcome of the automatic review process to the SCRA, expressly informed her that she had "exhausted (her) options in terms of the Act and (was) not otherwise entitled to remain in the Republic of South Africa." The applicant states that she was not legally represented at the time the SCRA decision was communicated to her. In these circumstances, the applicant can hardly be faulted for not immediately taking up the cudgels of litigation on being told that the refusal of her application for asylum was final.

[59] The facts indicate that through the assistance of ProBono.Org, attorneys Denys Reitz sent a letter to the Durban Refugee Reception Centre on 6 May 2011 requesting a copy of the applicant's file for purposes of assessing the merits of a possible review. Despite the fact that the letter was marked urgent, no response was forthcoming. Had the Department responded to the request, the applicant would have been in a position to obtain proper legal advice on her rights within the 180 day-period laid down in PAJA.

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7 *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases*, above, at para 25

[60] In the absence of any response over a protracted period, the applicant sought the assistance of her current attorneys who obtained her file and attempted to effect a non-litigious settlement of the matter. This was done, first by seeking to join the applicant's file with that of her husband, and, subsequently, by making what may best be described as the applicant's "informal" second written submissions to the SCRA. Neither of these attempts succeeded; the applicant's husband absconded and closed off the first of the two possible avenues of settlement described above, and the SCRA ignored the applicant's second written submissions, leaving the applicant with no choice but to resort to litigation.

[61] I am satisfied that in the circumstances of this case, as detailed above, the interests of justice require an extension of the time period for the institution of the applicant's review application. There is sufficient evidence to indicate that the applicant took deliberate steps to exercise her rights. She did this despite a failure on the part of the SCRA or the RSDO to provide her with reasons for the final decision or of her right to request reasons, and a further failure on the part of the Durban Refugee Reception Centre to respond to an urgent communication requesting the information necessary to determine the merits of a review.

[62] While her second set of attorneys, Lawyers for Human Rights, in hindsight may appear to have wasted some time in seeking an extra-curial solution to her problem, this cannot be held against the applicant. It is well documented in the law reports that the applicant's attorneys undertake public interest litigation on behalf of many vulnerable litigants who, otherwise, would be

deprived in reality of access to the courts. It is not unreasonable for attorneys involved in public interest work to seek to protect their clients' rights through direct interaction and negotiation with departments of state rather than by seeking to litigate as a first resort. In fact, such an approach, together with an open-minded attitude on the part of relevant departmental officials, ought to be encouraged as a way of ensuring that justice is done more speedily, and in a less costly manner than by resorting to litigation in every disputed case.

[63] There is no doubt that the issues involved in this case are of paramount importance for the applicant. Should she be denied the opportunity to review the decisions, she will have to return to the country of her birth in circumstances where her legal, social and political status is open to question. On the other hand, there does not appear to be any prejudice to the respondents. Indeed, they did not aver in the answering affidavit that they would suffer prejudice if the applicant's request was granted, nor did Mr Bofilatos SC, who appeared on behalf of the respondents, identify any form of prejudice in his written and oral submissions before me. It seems to me that in view of the respondents' various delays in reaching their decisions and conveying these to the applicant, it can hardly be suggested that time is of the essence in terms of their own administrative processes.

[64] Finally, for the reasons dealt with in more detail below, I am satisfied that there is merit in the applicant's application for review and, for this reason too, I am mindful of not permitting a delay in the institution of the review

proceedings from preventing me from rectifying a miscarriage of the rule of law in this case.

[65] I have included an appropriate prayer to extend the time limit for the applicant's review application in terms of section 9 of PAJA in the order I make.

THE GROUNDS OF REVIEW

[66] The applicant relies on the following grounds of review:

[66.1] Procedural unfairness in that:

[66.1.1] the applicant was provided with inadequate assistance by the Department in the asylum application process;

[66.1.2] the written reasons the applicant was given by the RSDO conflict with the written reasons the RSDO provided on the BI-1590 form. Consequently, the applicant was not informed of all the reasons for the RSDO's decision and could not properly respond thereto;

[66.1.3] the RSDO failed to investigate the applicant's claim in light of the relevant current country conditions;

[66.1.4] the RSDO failed to accept the applicant's representations to the SCRA;

[66.1.5] the SCRA failed properly to investigate the applicant's claim for asylum;

[66.1.6] the SCRA failed to provide reasons for its decision, and failed to advise the applicant that she was entitled to request reasons;

[66.1.7] the SCRA's decision was not translated into a language that the applicant understood;

[66.1.8] consequently, the applicant avers that the RSDO's decision and the SCRA's decision fall to be reviewed and set aside in terms of section 6(2)(c) of PAJA.

[66.2] The RSDO and the SCRA committed an error of law in concluding that the applicant did not meet the relevant requirements for refugee status as stipulated in the Act. In particular, they failed to consider the fact that the applicant would face persecution if she returned to her country of origin, Ethiopia, or to Eritrea. Consequently, the applicant avers that the RSDO's decision and the SCRA's decision fall to be reviewed and set aside in terms of section 6(2)(d) of PAJA.

[66.3] The RSDO and the SCRA took irrelevant considerations into account, and failed to take relevant considerations into account in reaching their decision. The applicant avers that they based their decisions on errors of fact, and that they failed to assess her application in light of the past and present country conditions pertaining to Ethiopia and Eritrea. Consequently, the applicant avers that the RSDO's decision and the SCRA's decision fall to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA.

[66.4] The decisions of the RSDO and the SCRA are otherwise unconstitutional in that, among others, they offend against the applicant's right under section 20 of the Constitution to be protected from the deprivation of her citizenship. Consequently, the applicant avers that the RSDO's decision and the SCRA's decision fall to be reviewed and set aside in terms of section 6(2)(i) of PAJA.

[67] I will deal with the merits of the applicant's case on each of the grounds of review shortly. First, it is necessary to consider the legal framework within which the asylum process operates, and the powers, functions and responsibilities assigned to the RSDO and the SCRA under the legislation.

THE RELEVANT LEGAL FRAMEWORK

[68] The Act was brought into effect to ensure South Africa's compliance with the international legal obligations it assumed on acceding to, among other international human rights instruments, the 1951 Convention Relating to

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.[8]

[69] Section 2 of the Act prescribes a general prohibition against the expulsion, extradition or return from South Africa to a country in circumstances where the person affected may be subject to persecution on various grounds, including his or her race, nationality or membership of a particular social group. The prohibition also extends to circumstances in which the affected person's life, physical safety or freedom will be threatened by, among other things, events causing the disruption or disturbance of public order in the other country. Section 2 entrenches South Africa's international legal obligation of *nonrefoulement*.[9]

[70] In the same vein, and giving effect to this obligation, section 3 sets out the following grounds in terms of which a person will qualify for refugee status:

> "*(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

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8 This is expressly stated in the Preamble to the Act.

9 *Tantoush v Refugee Appeal Board and Others*, above, para 63

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or 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; or

(c) is a dependant of a person contemplated in paragraph *(a)* or *(b)*."

[71] An application for asylum comprises two stages. If an application is rejected a third stage comes into play. An asylum seeker comes into contact in the first instance with a Refugee Reception Officer ("RRO"). At this stage the asylum seeker completes the relevant application form.[10] The second stage of the process involves the asylum seeker being required to attend an interview before a RSDO for purposes of determining the applicant's eligibility for asylum.[11] If the RSDO rejects the application for asylum the matter proceeds either to the Appeal Board[12] or to the SCRA[13] for an appeal or review. A refusal automatically falls to be reviewed by the SCRA if a RSDO rejects an application on the basis that it is "manifestly unfounded, abusive or fraudulent".[14] This is what occurred in the present case.

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10 In terms of section 21 of the Act, read with regulation 3(2)(a) of the Regulations to the South African Refugees Act, GN R366 of 6 April 2000 ("the Regulations").

11 In terms of section 24 of the Act, read with regulation 3(2)(b) of the Regulations.

12 In terms of section 26 of the Act.

13 In terms of section 25 of the Act.

14 Section 24(3)(b), read with section 25(1) of the Act.

[72] The Act expressly requires that all RROs and RSDOs must "have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions" (my emphasis).[15]

[73] The functions and responsibilities of the Department of Home Affairs, RROs and RSDOs are outlined in the Act and the Regulations. They include the following:

[73.1] The Department is required, where this is "practicable and necessary" to provide "competent interpretation for the applicant at all stages of the asylum process." Where it is not practicable to do so, the applicant will be required to provide his or her own interpreter, but must be given at least 7 days advance notice of this.[16]

[73.2] The RRO is expressly required to ensure that an applicant is provided adequate interpretation.[17] In addition, he or she must "see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard". He or she may conduct any necessary enquiry to verify the information furnished in the application.[18]

[73.3] In assessing an application for asylum, a RSDO may request information or clarification from the applicant that he or she deems

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15 Section 8(2)(b)
16 Regulation 5
17 Regulation 4(1)
18 Section 21(2)(b) and (c)

necessary.[19] The RSDO may also, if it is necessary to do so, consult with a UNHCR representative to furnish information on specific matters.[20]

[73.4] The Act expressly requires the RSDO to have regard to an applicant's right to just administrative action in terms of section 33 of the Constitution. In particular, the RSDO "must ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented".[21]

[73.5] In terms of the Regulations, the RSDO must determine an applicant's eligibility for refugee status "on a case-by-case basis, taking into account the specific facts of the case and conditions in the country of feared persecution or harm" (my emphasis).[22]

[73.6] To this end, the RSDO may, inter alia, consider information regarding country conditions from reputable sources, or consult with a UNHCR representative to provide information.[23]

[73.7] The RSDO must provide written reasons for any decision to refuse or reject an application for asylum within 5 working days. The

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19 Section 24(1)(a)
20 Section 24(1)(b)
21 Section 24(2)
22 Regulation 12(1)
23 Regulation 12(1)(b) and (c)

record of the proceedings and a copy of the reasons must be forwarded to the SCRA.[24]

[74] As far as the SCRA is concerned, the Act expressly provides that it "must function without any bias and must be independent" (my emphasis).[25] In addition, members of the SCRA, as well as the chairperson are appointed by the Minister with due regard to "their experience, qualifications and expertise, as well as their ability to perform the functions of their office properly."[26]

[75] One of the functions of the SCRA is to review the decisions of RSDOs to reject asylum applications as "manifestly unfounded".[27] The SCRA's powers of review in this regard are wide.[28] They include the power to:

[75.1] Invite the UNHCR representative to make oral or written representations;

[75.2] Request the attendance of any person who is in a position to provide it with information relevant to the matter being dealt with;

[75.3] Of its own accord, make such further enquiry and investigation into a matter being dealt with as it deems appropriate;

[75.4] Request an applicant to appear before it to provide such other information as it may deem necessary.

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24 Section 24(4)
25 Section 9(2)
26 Section 10(2)
27 Section 11(e)
28 Section 25(1)

[76] The SCRA may confirm or set aside a decision made by a RSDO to the effect that an asylum application is manifestly unfounded, abusive of fraudulent.[29] It is required to inform the RSDO of its decision in this regard.[30] The Act does not specifically require the SCRA to provide reasons for its decision, or to convey or cause to convey any reasons to an applicant. This is an issue of some significance in light of the applicant's grounds of review in this matter, and I will have more to say on this score later.

[77] The respondents correctly point out that in terms of the Regulations an applicant for asylum bears the burden of proof for purposes of establishing that he or she is a refugee as defined in the Act. This is expressly stated in regulation 11(1).[31]

[78] This court has held, in *Tantoush v Refugee Appeal Board and Others*,[32] that this does not require an applicant for asylum to prove a real risk of persecution on a balance of probabilities. Instead, the appropriate standard is one of 'a reasonable possibility of persecution'.[33] This conclusion is consistent with two earlier decisions of this court, viz. *Van Garderen NO v Refugee Appeal Board*[34] and *Fang v Refugee Appeal Board and Others*.[35] In *Van Garderen NO*, the court held that:

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29 Section 25(3)(a)
30 Section 25(4)
31 Regulation 11(1) provides that:
> "The applicant bears the burden of proof to establish that he or she is a refugee as defined in section 3 of the Act and is not excluded from refugee status pursuant to section 4 of the Act."
32 Above
33 At para 97
34 TPD case No 30720/2006, 19 June 2007, unreported decision
35 2007 (2) SA 447 (T)

"In my view by simply referring to the normal civil standard, the RAB imposed too onerous a burden of proof. It is clear . . . that allowance must be made for the difficulties that an expatriate applicant may have to produce proof. It is also clear that there is a duty on the examiner himself to gather evidence. ... The inquiry has an inquisitorial element. The burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle."[36] (my emphasis)

[79] While all three of these decisions deal with the procedure involving the Refugee Appeal Board, rather than the SCRA, in my view there is no material difference in the processes involved warranting a departure from the principles laid down. The obligations of the RRO and RSDO are common to all asylum applications. Like the Refugee Appeal Board, the SCRA has the power to undertake its own investigations in review proceedings. The process before all of these functionaries and bodies involves an inquisitorial element. This is no doubt premised on the fact that, as the court in *Van Garderen NO* noted in the dictum cited above, refugees inevitably can be expected to have difficulty producing evidence to substantiate their averments. As I explain in more detail later, this is an important aspect of the asylum procedure for purposes of the present case.

PROCEDURAL UNFAIRNESS

[80] Section 3(2) of PAJA provides that administrative action that materially and adversely affects a person's rights must be procedurally fair. Fair

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36 Cited in *Tantoush* at para 97

administrative procedure depends on the facts of each case. In order to give effect to the right to procedurally fair administrative action, the administrator concerned must, among other things, provide the affected person with a reasonable opportunity to make representations;[37] provide a clear statement of the administrative action;[38] provide adequate notice of a right of review or internal appeal;[39] and provide adequate notice of the right to request reasons.[40]

[81] Section 33(2) of the Constitution guarantees that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 5(1) of PAJA affords a person the right to request written reasons for administrative action that has materially and adversely affect him or her. In addition, section 5(3) provides that where an administrator fails to furnish adequate reasons, a court in review proceedings must presume that the administrative action concerned was taken without good reason.

[82] The Refugees Act adds flesh to the general procedural fairness obligations imposed on departmental officials under the Constitution and PAJA. As discussed earlier, the Act imposes the following relevant duties on departmental officials involved in the process of administering and vetting asylum applications:

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37 Section 3(2)(b)(ii)
38 Section 3(2)(b)(iii)
39 Section 3(2)(b)(iv)
40 Section 3(2)(b)(v)

[82.1] The Department is obliged to ensure adequate and competent interpretation for an asylum applicant at all stages of the process, from inception when written application is made to the RRO.[41]

[82.2] If the Department is unable to provide interpretation services, an applicant must be given at least 7 days notice that he or she will be required to bring his or her own interpreter to the interview before the RRO or RSDO.[42]

[82.3] The RRO is required to assist an applicant where necessary and to ensure that the relevant application form is properly completed.[43]

[82.4] The RSDO is expressly enjoined to ensure that an applicant's constitutional rights under section 33 are given effect to, and must also ensure that the applicant fully understands the procedure, his or her rights and the evidence presented.

[82.5] The RSDO must take into account the specific facts of each case before him or her, including the conditions in the country of feared persecution or harm. To this end, the RSDO is given specific powers to request, seek and obtain relevant information.[44]

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41 Regulation 4(1) read with regulation 5(1)
42 Regulation 5(3)
43 Section 21(2)(a)
44 Regulation 12

[82.6] The RSDO is expressly required to give written reasons in the event that an asylum application is rejected.[45]

[83] These requirements form a critical component of the state's obligation to ensure that deserving asylum applicants are not turned away, and that the state meets its international legal obligations towards persons seeking refugee status.[46] The Preamble to the 1951 United Nations Convention Relating to the Status of Refugees indicates that one of the underlying reasons for the adoption of the Convention was to "assure refugees the widest possible exercise of (their) fundamental rights and freedoms". Similarly, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa recognizes in its Preamble that it is desirable to provide refugees in Africa with a "better life and future" and that, to this end there is a "need for an essentially humanitarian approach towards solving the problems of refugees".

[84] In my view, these obligations cannot begin to be met unless the relevant departmental officials comply with the prescripts of procedural fairness in dealing with asylum applications. Fair process is the most basic of requirements without which the state's obligations towards refugees will be stillborn.

[85] In the present case, the applicant's allegations of procedural unfairness pertain to both the decision of the RSDO and that of the SCRA. The

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45 Section 24(4)(a)

46 *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA) at para 68

itemised grounds of review under this head, which I have set out fully earlier, may conveniently be categorised as follows:

[85.1] The Department failed to provide the applicant with adequate and competent interpretation assistance for purposes of her application.

[85.2] The RSDO and the SCRA failed to comply with various aspects of their obligations to provide adequate reasons for their decisions.

[85.3] The RSDO refused to accept the applicant's representations to the SCRA with the effect that they were not considered by the SCRA.

[85.4] Both the RSDO and the SCRA failed to comply with their obligation to investigate the applicant's claim adequately before making their respective decisions.

[86] I will deal with each of these categories of complaints in turn.

The failure to render adequate and competent interpretation assistance

[87] The essence of the applicant's complaint in this regard turns on the issue of language and her right to adequate assistance, including competent interpretation services, in her asylum application process. This complaint affects the decision by the RSDO to refuse the applicant's asylum application.

[88] According to the applicant, her first language is Tigrinya. She avers that she was not provided by the Department with the assistance of an interpreter when she completed her BI-1590 form for submission to the RRO, and was

left to find her own interpreter. This interpreter did not speak Tigrinya, but only Amharic. While the Department provided her with the services of an interpreter for purposes of her interview with the RSDO, the applicant avers that he was also an Amharic speaker, and that he translated into that language, rather than the applicant's language. The applicant did not speak very good Amharic at that time. She avers that the Department did not enquire from her whether she required an Amharic or a Tigrinya interpreter.

[89] The applicant contends that the relevant Departmental officials failed in these respects to provide her with adequate assistance in her asylum application process contrary to their express obligations under the Act and Regulations, and contrary to their obligation to ensure fair administrative action. She submits that these procedural deficiencies led to discrepancies in the information provided to the RRO and the RSDO, which had a negative impact on the outcome of her asylum application.

[90] Somewhat perplexingly, the Chairperson, who deposed to the answering affidavit, meets these contentions by denying that the applicant's first language is Tigrinya, and asserting that she should have been able to understand both Amharic and English. He does not claim to have any personal knowledge of the applicant, or ever to have met or spoken with her. Quite how the Chairperson can claim to have personal knowledge of the applicant's first language sufficient to place any doubt on her averment that she is a Tigrinya speaker is unclear. It is also unclear on what basis he can testify as to the applicant's proficiency in other languages. For his denial that the applicant's first language is Tigrinya, it seems that the Chairperson relies

on the BI-1590 form completed on behalf of the applicant in which it is stated that her home language is Amharic and her other language is "Tigrigna". As I indicated earlier, this is the form that was completed with the assistance of an Amharic interpreter whom the applicant herself engaged in the absence of interpretation services provided by the Department at the Durban Refugee Reception Centre. The applicant explains that the language barrier between them caused inconsistencies in her application form. The applicant provides proof, in the form of an unchallenged affidavit by Dr Mezmur, to the effect that:

> "As the Applicant was born and brought up in *Zala Ambassa*, and I am told that her mother was a Tigre from Eritrea while her father was from the Tigray region in Ethiopia, it is natural that the Applicant would have spoken Tigrinya as her native tongue (if not as her only language). Amharic, while it may have been taught at some schools, is not the predominant language in that area which is close to the border with Eritrea." (The words in brackets are in the original.)

[91] Dr Mezmur also confirms that:

> "Tigrinya would also have been the medium of instruction at schools in the region. In fact, it is to be noted that after the fall of the *Derg* regime in 1991, the new constitution of the Federal Democratic Republic of Ethiopia granted all ethnic groups the right to develop their languages and to establish mother tongue primary education systems. This is a marked change to the language policies of previous governments in Ethiopia, which the Tigray region has implemented in its school system.

... Amharic is a separate and distinct language from Tigrinya and speakers of each language would not automatically be able to speak the other language or understand each other. In other words, I confirm that the two languages are definitely not mutually intelligible." (emphasis added)

[92] A further affidavit by Mr Mamush Machebo Keffete, who is a native Ethiopian Amharic speaker, confirms that in speaking to the applicant it is apparent to him that Tigrinya is her first language and that she speaks Amharic with an accent indicating that it is not her native tongue. This evidence is not challenged. For sake of completeness, I should point out that the applicant states that during her years in South Africa, her knowledge of Amharic has developed from what it was when she applied for asylum as a result of her interaction with Ethiopian Amharic speakers.

[93] In light of all of this, the applicant's evidence to the effect that her first language is Tigrinya must be accepted. There is no substance in the Chairperson's denial of this fact. Furthermore, it seems to be clear that the description of the applicant's first language as Amharic in the BI-1590 was inaccurate, and most likely a result of the language gap between the applicant and the interpreter whose services she obtained when she lodged her application for asylum.

[94] It is common cause that the applicant was not afforded any interpretation services provided by the Department in the completion of her BI-1590 form, nor was she given the requisite seven-day's notice that she would be required to provide her own interpretation services. There is no affidavit from

the relevant RRO indicating that he or she took any steps to ensure, as required under section 21(2), that the BI-1590 form was properly completed, or what, if any, assistance was rendered by the RRO to the applicant in this regard.

[95] In the absence of the Department providing interpretation services to her, the applicant was reduced to using the services of an Amharic interpreter for purposes of completing her BI-1590 form. On the basis of the facts averred by the applicant, which are supported by Dr Mezumur's evidence regarding the differences between Amharic and Tigrinya, I accept that there was a substantial language gap between the applicant and the interpreter who provided the information in English that was included in the BI-1590 form.

[96] The same problem occurred in the interview process before the RSDO. Although the Department provided an interpreter, once again, he was an Amharic speaker. It is not disputed that the RSDO did not ask the applicant whether she required a Tigrinya or an Amharic interpreter. The evidence indicates that the interview was conducted with interpretation between Amharic and English, rather than Tigrinya, the applicant's first language.

[97] Mr Tesfayohannes, who translated at the RSDO interview, disputes that the applicant did not speak Amharic well. He states that the applicant did not record that she was unable to understand what he was telling her, and that he understood everything that she said to him. Although Mr Tesfayohannes claims to speak Tigrinya, he does not go so far as to say in his affidavit that the interview was conducted in Tigrinya. In fact, he implies that it was

conducted in Amharic, and that the applicant was able to understand the language.

[98] In any event, it seems to me that even if the applicant was able to understand Amharic for purposes of her interview with the RSDO, the fact remains that she was not afforded the opportunity to be provided with Tigrinya interpretation either at the RRO stage of the process or the RSDO stage.

[99] Morever, even if Mr Tesfayohannes's averments are accepted, and it is assumed that the applicant was able to understand sufficient Amharic to follow the interview with the RSDO, this was not sufficient to ensure fair process. On the facts of the present matter, it is clear that the initial language gap at the stage when the applicant's BI-1590 form was completed had a materially detrimental effect on her entire application, including the interview process before the RSDO, and his ultimate decision to refuse her application as manifestly unfounded. This is demonstrated by the fact that, as the RSDO noted under the heading "For Office Use Only" on the BI-1590 form, the decision to reject the applicant's claim was because the "applicant claimed different claim contrary to the claim in Sec 4(f) of the application form." This conclusion was a direct result of what appeared to the RSDO to be inconsistencies in the facts set out by the first interpreter on the BI-1590 form, and the applicant's version of events in her interview with the RSDO. There can be no question but that the inadequate interpretation assistance that the applicant secured at the initial stage when her BI-1590 form was completed was responsible for this state of affairs.

[100] The absence of competent and adequate interpretation services at either stage of the process is, in my view, sufficient to render the decision of the RSDO to refuse the asylum application reviewable on the basis that the process followed in reaching the conclusion was procedurally unfair.

[101] The obligation on the Department to provide competent interpretation services is an important safeguard for applicants in the asylum process because, by their nature, asylum seekers often speak languages foreign to South Africans.[47] Unless an applicant has competent interpretation services at his or her disposal there can be no assurance that the evidence placed before the RRO and RSDO is accurate or properly understood by the applicant, or, needless to say, by the RSDO. Nor can it be said in those circumstances that an applicant has been given a reasonable opportunity to make appropriate representations to the RSDO, or that the RSDO's decision will be made properly with reference to all the relevant facts of the particular case.

[102] It seems to me, therefore, that these procedural requirements are fundamental not only to an applicant's right to a fair hearing, but also to the substantive outcome of an asylum application. This is amply demonstrated by the facts of the present case. For this reason alone, I find that the decision of the RSDO to refuse the applicant's application ought properly to be reviewed and set aside on the basis that it was procedurally unfair in this respect.

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47 *Deo Gracios Katsshingu v Chairperson of the Standing Committee for Refugee Affairs & Others*, WCHC case no. 19726/2010, 2 November 2011, unreported decision, p6

Failures in respect of the reasons for the decisions

[103] There are two prongs to this category of complaint by the applicant:

[103.1] In the first instance, the applicant contends that the written reasons for the RSDO's decision that were provided to her on 11 November 2009 were different to those provided by the RSDO under the heading "For Office Use Only" on the BI-1590 form. The applicant says that she was not informed of this latter reason, and, accordingly, was prevented from responding to it in her representations to the SCRA.

[103.2] In the second instance, the applicant contends that she was not given any reasons for the SCRA's decision to uphold the RSDO's rejection of her application. Furthermore, the SCRA did not advise her of her right to request reasons in terms of section 3(2)(b)(iv) of PAJA.

[104] As regards the first prong of this complaint, the facts establish that:

[104.1] The RSDO provided the applicant with a form advising her that the reason for the rejection of her application was that the grounds of asylum she relied on did not fall within the requirements of section 3 of the Act.

[104.2] The RSDO gave an additional, and different, reason for the rejection on the BI-1590 form under "For Office Use Only", viz. that the applicant had made different claims in her interview with the

RSDO to those set out in section 4(f) of her BI-1590 application form.

[104.3] This additional reason, written under the "For Office Use Only" section of the BI-1590 form, was not given to the applicant until her attorneys were provided with her asylum file after the SCRA had made its decision.

[104.4] However, it was provided to the SCRA as part and parcel of the applicant's departmental file, the contents of which were sent to the SCRA by the RSDO for purposes of the review under section 25.

[105] From these facts it is clear that the applicant was not given all of the reasons for the rejection of her application by the RSDO. This fact on its own is sufficient to establish an element of procedural unfairness in the decision-making process. The failure to advise the applicant that her application was rejected not only for the reason set out in the RSDO's notice to her but for the additional reason described in the BI-1590 form meant that the applicant was not given a clear statement of the decision in accordance with section 3(2)(b)(iii) of PAJA. The applicant was entitled to understand not only what the RSDO had decided but also on what legal and factual basis the decision had been made.[48] The RSDO only gave her a partial statement of his decision, and failed to advise her of the additional ground upon which her

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48 Hoexter, above p376: "The affected person should at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual basis. Without this information, notice of any right of appeal or review ... would be pointless."

application was refused, viz. that there were conflicts between the information in the BI-1590 form and the information provided at the interview with the RSDO.

[106] Moreover, PAJA enjoins administrators to provide "adequate reasons".[49] Obviously, what are adequate reasons will depend on a variety of factors. However, in my view it is axiomatic that at the very least, adequate reasons require that the affected person be provided with all of the reasons relevant to the decision. An administrator cannot elect to provide only some reasons, or neglect to provide them all. This is because the reasons for an adverse decision are critical to any challenge to the decision, and to the right to meaningful review of administrative action:

> "Reasons give one something to work with, for example in deciding whether an administrator has pursued improper purposes, taken irrelevant considerations into account or made an error of law."[50]

[107] This procedural irregularity had the effect of preventing the applicant from making appropriate submissions to the SCRA to deal with what the RSDO had identified as inconsistencies between the information contained in section 4(f) of the applicant's BI-1590 form and the information she gave at her interview with the RSDO. This is borne out by the fact that in her first written representations, the applicant only addressed issues relevant to the question of whether her case fell within the requirements of eligibility for asylum under section 3 of the Act. She did not address the inconsistency

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49 Section 5(2) and section 5(3)

50 Hoexter, above p463, and with reference, also, to *Koyabe v Minister for Home Affairs*, above at para 61

issue. Consequently, she was denied a reasonable opportunity to make representations in this regard. This inevitably impacts on the fairness of the review process conducted by the SCRA and on that body's decision to uphold the RSDO's decision to reject the applicant's application.

[108] The failure to provide the applicant with all of the reasons for the RSDO's decision rendered the asylum application process procedurally unfair. It had a directly prejudicial impact on the review process under section 25 and the decision reached by the SCRA. For this reason, the decision by the SCRA falls to be reviewed and set aside.

[109] The second prong of the applicant's complaint concerning the duty to give reasons relates to the failure of the SCRA to provide reasons for its decision to uphold the RSDO's rejection of the applicant's application.

[110] It is common cause in this regard that the SCRA did not provide the applicant with any reasons for its decision. The respondents contend as follows in this regard:

[110.1] The SCRA is under no duty in terms of the Act to provide reasons for its decision;

[110.2] If the applicant wished to be provided with reasons, her remedy lay in section 5(1) of PAJA, i.e. she should have requested reasons;

[110.3] In upholding the RSDO's decision, the SCRA "by necessary implication" agrees with the reasons given by the RSDO.

[111] As regards the first contention by the respondents, they point to the distinction I referred to earlier between section 24(4)(a) of the Act, which requires the RSDO to provide written reasons for the rejection of an asylum application, and section 25(4), which requires of the SCRA only that it inform the RSDO of its decision in the prescribed manner and form. The respondents submit that this distinction makes it plain that the legislature did not intend to impose any obligation on the SCRA to provide reasons to an affected party for its decisions.

[112] I am somewhat surprised by the respondents' submission in this regard. Not only does it fly in the face of the right under section 33(2) of the Constitution for a person adversely affected by an administrative decision to be provided with written reasons therefor, but it is also a contention that has been soundly rejected by the Constitutional Court, in the context of the Immigration Act,[51] as being "excessively over-formalistic". In *Koyabe v Minister for Home Affairs*[52], Mokgoro J held as follows:

> " ... s 5 of PAJA must be viewed as giving effect to s 33(2) of the Constitution. These two provisions read together entitle the applicants to reasons. The respondents were thus incorrect in their contention that the applicants were not entitled to reasons for the immigration officer's decision to withdraw their residence permits, and that there was no obligation on their part to furnish reasons.
>
> The declaration that a person is an illegal foreigner under s8(1) impacts adversely on him or her. In addition to having to leave the country, it stigmatises the person and may become a basis for denial of entry into other foreign countries. As a consequence, a person will be anxious to know the basis for the declaration, particularly in circumstances where it might be based on a misunderstanding or incorrect information. In that regard, the person may want to appeal or have the decision reviewed and set aside by a higher authority. Reasons for the finding, as in this case, are therefore important in

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51 Act 113 of 2002, sections 8(1) and 8(3)

52 Above, paras 60-63, references excluded

seeking a meaningful review by the Minister and in enhancing the chances of getting the immigration agent's adverse finding overturned.

Further, in our constitutional democracy, officials are enjoined to ensure that the public administration is governed by the values enshrined in our Constitution. Providing people whose rights have been adversely affected by administrative decisions with reasons, will often be important in providing fairness, accountability and transparency. In the context of a contemporary democratic public service like ours, where the principles of batho pele, coupled with the values of Ubuntu, enjoin the public service to treat people with respect and dignity and avoid undue confrontation, the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners." (emphasis added)

[113] In my view, the same considerations apply in the context of sections 24 and 25 of the Act. For this reason, the respondents' submission that the SCRA was not required to provide the applicant with reasons for its decision must be rejected.

[114] The respondents' second contention is that the applicant's only remedy was to request reasons in terms of section 5(1) of PAJA.

[115] In my view, there are two significant flaws in this contention.

[116] In the first place, in the circumstances of this case, a resort to section 5(1) of PAJA would not have provided the applicant with an effective remedy. This section provides that:

> "Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that

the administrator concerned furnish written reasons for the action." (my emphasis)

[117] The administrator concerned is required to provide adequate written reasons within 90 days of the request.[53] Should he or she fail to do so, "it must be presumed in any proceedings for judicial review that the administrative action was taken without good reason."[54] Although the 90-day period for a request for written reasons under section 5(1) may be reduced, this is dependent on either consent between the parties or on an order of court granted on application by the affected party, where the interests of justice so require.[55]

[118] It is difficult to comprehend how, in reality, section 5(1) could have provided the applicant with any effective relief. More particularly:

[118.1] The applicant was advised of the SCRA's decision on 23 February 2011. At the same time, she was placed under notice to leave the country within 30 days, i.e. by 23 March 2011. The applicant simply would not have had the time to exercise her rights under section 5(1) within this period, even taking into account the possibility of a reduction in time under section 9(1).

[118.2] She was not advised of her right to request written reasons in accordance with section 3(2)(b)(v) of PAJA, and only obtained legal assistance in May 2011.

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53 Section 5(2)
54 Section 5(3)
55 Section 9(1), read with section 9(2). *Jikeka v South African Social Security Agency* 2011 (6) SA 628 (ECM), paras 11 & 12. See further the discussion in Hoexter, above, p474-6

[118.3] The respondents' stance in the present proceedings indicates that any request for reasons inevitably would have been met with the response that the SCRA was not obliged to provide them.

[119] In the *Koyabe* judgment, the Constitutional Court took the view that the right to request reasons (in section 5(1) of PAJA), "indicates a prior entitlement to reasons in the first place",[56] in line with 33(2) of the Constitution.[57] In other words, the right to reasons is not dependent on a prior request. Professor Hoexter has noted the uncertainty created by this decision, particularly in light of the relevant provisions of PAJA, which create a request-driven process for purposes of realising the right to reasons. However, as Professor Hoexter notes further, considerations of urgency in facilitating a meaningful review in the circumstances existing in the *Koyabe* case may account for the Constitutional Court's decision in this regard.[58]

[120] In my view, similar considerations apply in the present case. As I have indicated, in light of the particular facts that existed, the resort to section 5(1) by the applicant would have served no practical purpose. In these circumstances, it seems to me that the applicant's "prior entitlement to reasons" establishes a basis for review despite the absence of a request for reasons on her part. In such cases, the request-driven nature of the process envisaged in section 5(1) is inadequate to protect the applicant's constitutional right to be given adequate written reasons for the SCRA's

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56 Above, at para 61,n55

57 Section 33(2) of the Constitution provides that:

> "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

58 Hoexter, above p484-5

decision. Accordingly, the respondents' contention that the applicant's sole remedy lay in a request under section 5(1) cannot be accepted.

[121] The second flaw in the respondents' contention is that it overlooks the fact that the duty to give reasons serves a dual purpose: on the one hand, it provides benefits and protections for a person who is adversely affected by a decision; and on the other hand, it is a fundamental requirement of good governance in and of itself in that it advances the goal of transparency, and enhances public confidence in, and the legitimacy of, the administrative process. Critically, the duty to give reasons includes, not only procedural, but also substantive benefits. It improves the quality of decision-making and provides a safeguard against arbitrary or unreasonable decisions.[59] Thus, the duty to provide reasons forms an integral part of the decision-making process, and of fair and lawful administrative procedure.

[122] In the present case, the applicant in her founding affidavit challenged the SCRA's failure to provide reasons for its decision. If there were good reasons for the SCRA's decision, one would have expected that the SCRA would have provided them in its answering affidavit. It did not do so. This failure inevitably impinges on the substantive merits of the SCRA's decision. In the absence of any reasons being given for the SCRA's decision, there is no assurance that the decision was made fairly, reasonably, rationally and lawfully. Given the substantive importance of the duty to give reasons, in my view, it is no answer to contend, as the respondents do, that the applicant

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59 Hoexter, above, p463-4

ought to have asked for reasons, and that in the absence of such a request, she has no remedy.

[123] In the circumstances, there is no merit in the respondents' contention that the applicant's only remedy for the SCRA's failure to provide reasons was to request reasons in terms of section 5(1) of PAJA.

[124] For similar reasons, the respondents are not saved by their final contention in this regard, viz. their submission that the necessary implication of the SCRA upholding the RSDO's decision is that it agreed with the reasons relied on by the RSDO. In other words, they submit that the SCRA's reasons must be regarded implicitly as being identical to those of the RSDO.

[125] In this case, as I have indicated already, the SCRA offered no independent reasons for its decision. In these circumstances it seems to me that there is no room for accepting "inherently implied reasons" on the part of the SCRA: either it considered and adopted reasons for its decision or it did not. This is all the more so in light of the fact that a consideration of the powers of the SCRA under section 25 of the Act indicates that the intention of the legislature was to confer upon it review jurisdiction, as Murphy J put it in *Tantoush*, "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."[60]

[126] In the absence of reasons being provided by the SCRA, I cannot leap to a convenient assumption as to what the reasons were for its decision. On the

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60 Above, para 90. Although the *Tantoush* case involved the appellate powers of the Refugee Appeal Board, rather than the review powers of the SCRA, the substance of the relevant powers under the Act is such that the same considerations apply.

contrary, the fact that the SCRA is still unable to formulate its reasons, and relies on an inherent implication that its reasons are identical to those of the RSDO inevitably leads to the conclusion that it failed to apply its mind properly to the applicant's case, and simply rubber-stamped the RSDO's decision.

[127] The facts of this case illustrate the substantive importance of the requirement that administrators must formulate and provide affected parties with the reasons informing their decision-making process. The SCRA did not comply with its obligations to the applicant in this regard.

[128] What effect does this failure have on the validity of the SCRA's decision? The applicant's case, as set out in her founding affidavit, was that the failure to provide reasons, and the failure to advise the applicant of her right to request reasons *per se* rendered the SCRA's decision invalid on the basis of procedural unfairness. In the heads of argument submitted on behalf of the applicant, the challenge to the validity of the SCRA's decision in this regard is expanded beyond procedural unfairness. The applicant submits that the failure of the SCRA to provide its own reasons renders the SCRA's decision reviewable on rationality grounds.

[129] In this regard it is pertinent to note that there is some debate among writers on the question of whether any breach of procedural fairness on the part of administrator should, as a matter of course, result in the invalidity of the affected administrative decision or action. Professor Hoexter refers to Baxter's comment that, under the common law, courts have viewed the principles of fairness as being so important that they are enforced as a

matter of policy, and irrespective of the merits of the case.[61] More recently, writers have considered the issue in the PAJA era. Some, such as De Ville[62] and Grote,[63] suggest that an instrumental or pragmatic approach may be more appropriate, linking the invalidity arising out of a breach of procedural fairness with the outcome of the case or the actual substance of the decision. On this approach, invalidity of the decision concerned may not be appropriate in every case, but may be dependent on whether the substance of the decision is affected by the procedural fairness breach. De Ville submits on this basis that a breach of the duty to give adequate notice of the right to request reasons should not have an effect on the validity of the decision concerned, although it may have other implications.[64] Similarly, Currie and Klaaren suggest, with reference to section 3(2)(b) of PAJA, that only breaches of the duty to provide adequate notice of the nature and purpose of proposed administrative action,[65] and the duty to permit a reasonable opportunity to make representations[66] ought properly to be considered as breaches of procedural fairness, justifying the invalidity of the affected decision on this ground. They regard the remaining requirements under section 3(2)(b)(iii)-(v) of PAJA as being formal rather than substantive in nature, with the effect that their breach does not generally lead to an unfair decision. For this reason, they submit that a breach of these formal

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61 Hoexter, above, p386, citing L. Baxter Administrative Law, Juta, 1984, p540

62 JR de Ville *Judicial Review of Administrative Action in South Africa*, LexisNexis, 2005, p283, discussed in Hoexter at p386

63 Rainer Grote 'Procedural Deficiencies in Administrative Law: A Comparitive Analysis' (2002) 18 SAJHR 475 at 476, discussed in Hoexter at p386

64 De Ville (2003 edition) p256-7

65 In terms of section 3(2)(b)(i) of PAJA

66 In terms of section 3(2)(b)(ii) of PAJA

requirements should not lead to invalidity of the decision, unless the actual fairness of that decision is affected.[67]

[130] At one level, the duty of an administrator to give reasons for a decision may be viewed as a requirement of procedural fairness. It may be tempting to argue in such cases, as the applicant did in her founding papers in this case, that a failure to give reasons in and of itself constitutes a breach of procedural fairness, and that the decision is open to review simply on the basis of section 6(2)(c) of PAJA. However, in my view, and taking into account the views of the writers discussed earlier, the issue is not quite so simple. It seems to me that the real question that must be asked is what the substantive effect of the failure is on the decision. Very often, it is implicit from a failure to adduce reasons that the decision was not made reasonably, rationally, and on the basis of a proper application of the decision-maker's mind. This is what the legislature would seem to have had in mind in providing, in section 5(3) of PAJA, that if an administrator fails to provide reasons, it must be presumed (rebuttably) that the action concerned was taken without good reason. In other words, the failure to give reasons usually will point to substantive shortcomings in the decision itself, rendering the decision reviewable on the basis of one or other of the substantive grounds identified in section 6(2), rather than on the basis of procedural fairness *per se*.

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67 Iain Currie & Jonathan Klaaren 'Remedies for Non-Compliance with Section 3 of the Promotion of Administrative Justice Act' in Claudia Lange & Jakkie Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 31, discussed in Hoexter at p387

[131] While I find that the SCRA was under a duty to provide reasons to the applicant for its decision, in my view, this in and of itself does not establish a basis for setting aside the decision on the grounds of section 6(2)(c) of PAJA, as averred by the applicant in her founding papers.

[132] However, the fact that the SCRA failed, or more accurately, refused to provide any reasons for its decision inevitably impacts on the substance of the decision. The SCRA had wide powers of review under section 25. The applicant's application raised complex issues relating to the war between Eritrea and Ethiopia at the time that the events leading to the applicant leaving Ethiopia took place. In addition, the consequences for the applicant of a refusal of her application were grave. Just administrative action for the applicant in this situation demanded a proper application of the SCRA's mind, evidenced by reasons to justify its decision to uphold the RSDO's decision. In these circumstances, the failure of the SCRA to provide reasons for its decision, even in the answering affidavit, makes it difficult to reach any other conclusion but that its decision was made without good reason.

[133] In the absence of reasons, there is no evidence of a rational connection between the decision and the purpose for which it was taken, the purpose of the empowering provision and the information before the SCRA. This renders the decision reviewable on the basis of irrationality in terms of sections 6(2)(f)(ii)(aa), (bb) and (cc) of PAJA.

The failure of the SCRA to consider the applicant's first written representations

[134] The applicant responded to the RSDO's notice that she was entitled to make submissions to the SCRA for purposes of the review process under section

25. She drew up a set of written representations, dated 11 December 2009, which I shall refer to as the applicant's first written representations. According to the applicant, she attempted on two occasions to submit these to the RRO as instructed in the RSDO's notice to her. The applicant alleges that the officials concerned refused to accept her first written representations, or to stamp them to indicate that she had attempted to file them. She also alleges that when Lawyers for Human Rights obtained her asylum file from the Durban Refugee Reception Office, it did not contain a copy of her first written representations.

[135] If the applicant's allegations are correct, this amounts to a very serious procedural flaw in the decision-making process on the part of the SCRA. It would mean that the applicant was denied the opportunity to make representations to the SCRA despite that fact that she was expressly told that she could do so. In addition, of course, it would mean that the SCRA's decision was made without taking into account the relevant facts and circumstances set out in her representations.

[136] In defence of these allegations, the Chairperson on behalf of the respondents accuses the applicant of being dishonest in this regard. He avers that the applicant's first written representations were included in the record made available to her under Rule 53 of the Uniform Rules of Court. This, he says, is proof positive that the applicant was able to file her representations, that they were before the SCRA when it made its decision, and that the applicant is being dishonest in her averments.

[137] There are a number of difficulties with the respondent's case in this regard:

[137.1] The respondents admit that the applicant's first written representations did not form part of the contents of the applicant's file that was faxed to her attorneys by the Durban Refugee Reception Office. Logic dictates that had the Office accepted the applicant's first written representations, they would have been included in this file.

[137.2] The respondent does not provide any confirmation from anyone at the Durban Refugee Reception Office that the applicant's first written representations were accepted.

[137.3] The copy of the written representations annexed to the court papers does not reflect any stamp or other indication that it was received by the Durban Refugee Reception Office.

[137.4] The respondent's reliance on the fact that the first written representations formed part of the Rule 53 record as proof that the representations were successfully submitted does not withstand scrutiny. The applicant explains that her first written submissions came to form part of the Rule 53 record only because she annexed a copy to the second written representations her attorneys made to the SCRA in October 2012. This was part of her stillborn attempt to achieve a settlement of the matter without resort to litigation. The correctness of this explanation is born out by the fact that the words "Annexure 1" are written on the copy of the first written representations that formed part of the Rule 53 record. In her second written representations to the SCRA, the

applicant refers to the annexed copy of her first written submissions as "Annexure 1". The only copies annexed to the court papers are exactly the same, and are identically marked. This bears out the applicant's averment that the representations came to be included in the Rule 53 record because they were annexed to the second written representations of October 2012, and not, as the respondents insist, because they were accepted by the Durban Refugee Reception Office when the applicant attempted to file them.

[137.5] In the RSDO's submissions to the SCRA for purposes of the section 25 review process he makes no reference to any representations received from the applicant.

[137.6] There is no affidavit from the RSDO stating that he received the applicant's first written submissions and that he forwarded them to the SCRA for consideration as part of the review process. There is no affidavit from any other relevant official to this effect.

[137.7] There is no affidavit from any officer involved in the SCRA's decision to confirm that the applicant's first written submissions were before the SCRA and were taken into consideration in the review process. The Chairperson makes the averment that the written representations were before the SCRA. However, as I have already indicated, there is no evidence that he was involved in the review of the applicant's case, and his averment in this regard is no more than hearsay.

[138] In short, all of the evidence points to the truth of the applicant's averments. On this evidence, the applicant's first written representations were only received by the SCRA in October 2012 at the earliest. This was more than two years after the SCRA made its decision. I conclude, therefore, that the applicant has established that her first written submissions were not before the SCRA, and hence the SCRA did not consider them in reaching its decision to uphold the RSDO's rejection of the applicant's application.

[139] The SCRA's decision was procedurally unfair in this regard, and falls to be reviewed and set aside on this basis too.

The failure of the RSDO and the SCRA to investigate the applicant's claim

[140] The applicant contends that neither the RSDO nor the SCRA carried out a proper investigation of her claim for asylum before deciding that she was not eligible. Specifically, she avers that they did not carry out any investigation or research into the country conditions in Ethiopia and Eritrea and the consequences thereof for people who, like the applicant, share both Ethiopian and Eritrean ethnicity. The applicant contends that procedural fairness and a proper consideration of her application for asylum required at least a minimal attempt on the part of the RSDO and the SCRA to consider relevant country conditions and to determine what the prevailing situation is for a person in her position.

[141] The Chairperson in his answering affidavit implies, I can put it no higher than this, that the relevant country reports may have been considered by the RSDO and the SCRA. I have dealt with the hearsay nature of his evidence previously when it comes to what transpired in both decision-making

processes. Very little store, if any, can be placed on his statements in this regard. It is uncontested that the RSDO, Mr Cliff, provided the applicant with his typed up determination rejecting her application within 30 minutes of the conclusion of the interview. It is reasonable to conclude that he would not have had time, in this short period, to have conducted any meaningful investigation of the country conditions in Ethiopia and Eritrea before making his decision. We have no information on the process followed by the SCRA in deciding to uphold the RSDO's rejection of the applicant's application. Given the paucity of information given, and the absence of any reasons provided by the SCRA, I cannot but conclude that it did not conduct any country condition investigations before making its decision.

[142] This conclusion is consistent with the respondents' response to the applicant's complaint. They assert that there is no obligation on the RSDO or the SCRA to investigate country conditions in circumstances where "the material facts, due to their inconsistency, in themselves constitute a ground for rejection as manifestly unfounded". Further, that "it is only when an applicant furnishes a plausible version of his own particular circumstances, that country reports are then considered as well." The respondents say that the applicant's case contained material inconsistencies and they were entitled to reject her application for this reason alone, without considering the country conditions pertaining to Ethiopia and Eritrea.

[143] In my view, this approach is problematic in a number of respects:

[143.1] Firstly, it ignores the fundamental obligation of *nonrefoulement* that is expressed in section 2 of the Act, and is given effect to in

the definition of eligibility for asylum in section 3. This obligation underpins and guides the exercise by RSDO and the SCRA of their powers under the Act. In exercising their powers, the RSDO and the SCRA are obliged to make sure that a decision they reach will not have the effect of returning an asylum applicant to a country where he or she may be subject to persecution or threats as outlined in these sections.

[143.2] This must, of necessity, involve an obligation to give consideration to the relevant country conditions.

[143.3] Regulation 12 confirms this obligation. It states, in relevant part, that:

> "each eligibility determination will be made on a case-by-case basis, taking into account the specific facts of the case and conditions in the country of feared persecution or harm."

[143.4] In my view, the duty on a RSDO is clear; he or she must give consideration to the country conditions. This is not an optional extra to be considered purely at the discretion of the RSDO. While the RSDO has a discretion as to what information to obtain and consider, and how to obtain it, in my view he or she cannot simply ignore the relevant country conditions altogether.

[143.5] Furthermore, as I have indicated, RSDO's are required to be appointed with due regard to their experience and knowledge of

refugee affairs. The proceedings in eligibility interviews are non-adversarial, and the RSDO has a duty to ensure that the applicant understands the process and the evidence presented. The process involves an inquisitorial element. These features of the system point to a duty on the part of the RSDO to engage properly with all the relevant factors in each case, including the country conditions. In my view, they are at odds with the respondents' contention that the RSDO is first and foremost concerned with the plausibility of an applicant's case, and only if satisfied that it is plausible, is he or she required to consider the relevant country conditions and related factors.

[143.6] In any event, it is difficult to understand how, without considering the relevant country conditions, a RSDO properly can form a view as to the plausibility of an applicant's claim.

[143.7] As far as the SCRA is concerned, in my view, its situation is no different. Its powers in a section 25 review are deliberately widely framed. Not only must the SCRA consider whether the rejection of an asylum application by a RSDO was correctly made, but it is given express powers to secure and consider further relevant information. As Murphy J found in the *Tantoush* judgment, in dealing with the appeal powers of the Refugee Appeal Board under the Act, which are of a similar nature:

> "... because of the 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 - *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 592A - E. In both kinds of appeal the primary function is one of reconsideration of the merits of the decision in order to determine whether it was right or wrong, or perhaps vitiated by an irregularity to the extent that there has been a failure of justice."[68]

[143.8] The SCRA has oversight over, and must ensure compliance with, the state's obligations under section 2 of the Act in the asylum application process. The SCRA cannot fulfill this function without giving consideration to the relevant country conditions in each case.

[144] For these reasons, I am unable to accept the respondents' submission that the duty to give consideration to, and investigate the relevant country conditions only arises if the RSDO is satisfied as to the plausibility of an applicant's claim. Of course, the plausibility of a claim is a factor that must be considered. However, a proper conclusion regarding plausibility can only

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68 Above, para 90

be reached after due consideration of, among other things, the relevant country conditions.

[145] Insofar as the applicant's application is concerned, her BI-1590 form indicated that she came from the Tigray region of Ethiopia. The information included under section 4(f) of the form referred to political problems and the activities of the EPRDF. In her interview with the RSDO, she indicated that she and her family lived along the Eritrea/Ethiopia border; that her mother was Eritrean while her father was Ethiopian; that her mother was deported to Eritrea in 1999; that her father died and the family's shop, home and grain store were burned in 1999; and that she left Ethiopia after her father had died because the family came from the border region between Ethiopia and Eritrea. These facts should have alerted the RSDO, who is required to have relevant knowledge, that it was necessary to consider the country conditions in Ethiopia and Eritrea in order properly to evaluate the applicant's claim. The SCRA was under a similar obligation to do so. The basic facts provided by the applicant during her interview were sufficient to trigger an appreciation on the part of the RSDO and the SCRA that she had been caught up in the conflict between Ethiopia and Eritrea and that her situation required further investigation. Both the RSDO and the SCRA seem entirely to have ignored the context of the Eritrean and Ethiopian conflict in reaching their decisions.

[146] In the absence of considering the country conditions in Ethiopia and Eritrea, the RSDO could not properly conclude that the applicant's claim "was based on reasons that are not stipulated" in section 3 of the Act. Nor, indeed, could

the RSDO correctly conclude that her version of events was implausible. In turn, the SCRA could not properly decide to uphold the RSDO's decision.

[147] I conclude that in failing to give any consideration to the relevant country conditions pertaining to the applicant's application, both the RSDO and the SCRA failed to comply with the requirements of fair administrative procedure. As a result of their failure, the applicant was denied a reasonable opportunity to make relevant representations in accordance with her rights under section 3 of PAJA.

[148] I am accordingly satisfied that, on this basis too, the decisions of the RSDO and the SCRA fall to be set aside on review.

THE SUBSTANTIVE GROUNDS OF REVIEW

[149] The applicant relies on additional grounds of review over and above the grounds of procedural unfairness dealt with above. The applicant contends that the RSDO and SCRA failed to take into account relevant considerations, and took into account irrelevant considerations in refusing her asylum application; that the decisions were materially affected by errors of law; and that they were otherwise unconstitutional.

[150] There is a necessary overlap between some of the procedural grounds of review and these substantive grounds. So, for example, my finding that the RSDO and SCRA acted unfairly in failing to consider the country conditions pertaining to Ethiopia and Eritrea in rejecting the applicant's asylum application inevitably leads to the conclusion that they failed to take into account relevant considerations that were material to the legality of their

decisions. The failure of the SCRA to consider the applicant's first written submissions leads to a similar conclusion. In addition, and as I indicated earlier, the failure of the SCRA to provide reasons for its decision also impacts on the substantive merits of its decision.

[151] There was no attempt by the RSDO or the SCRA to consider the political situation prevailing between Ethiopia and Eritrea at the time that the applicant left Ethiopia. It is inconceivable that departmental officers who are appointed to their positions on the basis of their knowledge of refugee affairs would not have known of the war between these two nations over the relevant period, and its continuing consequences today. Instead, the RSDO took into account only that the applicant had no-one in Ethiopia with whom she could find shelter and rejected her claim on this basis. This decision, and the SCRA's subsequent decision to uphold it, were a direct result of the relevant officials failing to take into account relevant considerations and placing emphasis instead on irrelevant considerations.

[152] In a related vein, the applicant contends that the decisions of the RSDO and the SCRA were materially influenced by an error of law in that they incorrectly concluded that she did not fall within the defined categories of eligibility for refugee status contained in section 3 of the Act. As indicated earlier, an applicant will be eligible for refugee status if:

[152.1] He or she has a well-founded fear of being persecuted by reason of, among others, his or her race, tribe, nationality or membership

of a particular social group and is unable, or unwilling, as a result of that fear, to return to their country of nationality;[69] or

[152.2] Owing to external aggression or events seriously disrupting or disturbing public order in his or her country of origin or nationality, the applicant is compelled to leave his or her place of habitual residence and seek refuge elsewhere.[70]

[153] The applicant's case is that she has a well-founded fear of persecution if she were to return to either Ethiopia or Eritrea for reasons of her race, tribe, nationality and membership of a particular social group, and that the RSDO, and consequently the SCRA, committed material errors of law in finding that she does not.

[154] The applicant includes in her founding affidavit reference to extracts and findings from various sources, including reports from United Nations agencies, non-governmental organisations and international tribunals. These sources provide insight into the country conditions in Ethiopia and Eritrea insofar as they relate to a person in the applicant's situation, viz. a person who was an Ethiopian citizen from Tigray, of mixed Ethiopian and Eritrean ethnic parentage, who fled Ethiopia as a young girl at the time of the war between the two countries, and who has no documentation to prove her nationality. On the basis of the country conditions information included in the applicant's affidavits, she avers that her situation is as follows:

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69 Section 3(a)
70 Section 3(b)

[154.1] According to the Ethiopia-Eritrea Claims Commission, based on the 2003 Proclamation of Ethiopian Nationality, as a "dual national", i.e. an Ethiopian who is perceived to have Eritrean origins (through her mother), who left Ethiopia for another country, she is no longer determined by Ethiopia to be an Ethiopian national. This constitutes an arbitrary deprivation of her nationality, and renders her stateless.

[154.2] Research indicates that the Ethiopian authorities have refused to grant re-entry into Ethiopia to persons who fled during the war and who have Eritrean ethnicity.

[154.3] Although measures were taken after the war between Ethiopia and Eritrea to resolve some of the issues pertaining to Ethiopians with Eritrean ethnicity, these measures will not benefit the applicant as she did not remain in Ethiopia but fled from that country.

[154.4] Research conducted in Addis Ababa indicates that there is ongoing political and ethnic discrimination against Ethiopian-born ethnic Eritreans in all spheres of life, and that if war were to resume with Eritrea, they would be deported.

[154.5] Accordingly, the applicant indicates that even if she were able to return to Ethiopia which, she says, is unlikely for the above reasons, she faces persecution as a result of widespread ethnic discrimination and marginalisation of Ethiopians of Eritrean

descent. She fears arrest, assault or torture by authorities on suspicion that she is an Eritrean collaborator, on the basis of her ethnicity and the fact that she has been absent from Ethiopia for so long.

[154.6] The applicant's situation in Eritrea would be no better. It is unlikely that she would qualify for entry to that country as a national given that she has no ties to the country save for her Eritrean ethnicity. She has no contact with her mother who was deported to Eritrea many years ago, and no known relatives who could vouch for her in Eritrea.

[154.7] Due to the fact that she grew up in Ethiopia, she speaks Tigrinya with an accent that would identify her as a non-Eritrean.

[154.8] She would face conscription if she were admitted to Eritrea, which is arbitrarily and violently enforced in that country.

[154.9] For these reasons, the applicant states that she would also be likely to face persecution if she were sent to Eritrea.

[154.10] She also states that women of mixed ethnicities are particularly vulnerable to gender abuse and persecution in both Eritrea and Ethiopia.

[154.11] In addition, the applicant cites reports by Human Rights Watch, Amnesty International and other human rights organisations of abusive treatment meted out to individuals who are deported to

Ethiopia from other countries. This treatment includes solitary confinement, arbitrary detention and torture on the basis that they are suspected of having cooperated with enemy organisations while outside the country.

[154.12] A similar fate awaits refugees returning to Eritrea. An Amnesty International report of 2012 states that "seeking asylum abroad is considered by the Eritrean government to be an act of treason. Asylum seekers should not be returned to Eritrea, because they will be at grave risk of serious human rights violations."

[155] The applicant submits that there is sufficient indication from the reports and information contained in her founding affidavit to support a finding that she falls within the definition of a person eligible for asylum under section 3 of the Act. She submits further that the RSDO and SCRA ought to have taken these considerations into account and that their failure to do so amounts to an error of law on their part in that they incorrectly concluded that she fell outside of the parameters of section 3.

[156] The respondents go so far as to admit that there is a "strained relationship" between Ethiopia and Eritrea. For the most part, however, they rely on broad denials of the applicants submissions based on the research referred to in her affidavit. They point out that this information is in the form of hearsay, and is not properly admissible. They also state that the applicant did not rely on these facts in her application for asylum, and that because of the implausibility in her case, the RSDO and the SCRA were under no obligation to investigate these issues for themselves.

[157] It is so that the applicant did not present the RSDO with the detailed information set out in her founding affidavit regarding the country conditions in Ethiopia and Eritrea relevant to her situation. However, for reasons I have already detailed earlier, the RSDO and the SCRA are not passive arbiters in the asylum application process. They are statutorily bound to play an active role in the process to ensure that the state does not breach its *nonrefoulement* obligation under section 2 of the Act. Accordingly, as officials with appropriate knowledge and expertise in refugee affairs, they were duty bound to access and consider all relevant information pertaining to the eligibility of the applicant for asylum under section 3. In my view, there was sufficient information before the RSDO and the SCRA to trigger an investigation of the situation in Ethiopia and Eritrea as it relates to the applicant, who is Ethiopian with Eritrean ethnicity, whose origins were in the border conflict zone between the two countries, and who fled Ethiopia during the war between the states.

[158] As the applicant demonstrates in her affidavit, this information is not difficult to find, and it would not have placed an undue strain on the RSDO and the SCRA for them to have sought and had reference to information from similar sources. Both the RSDO and the SCRA have the power under the Regulations to consider "country conditions information from reputable sources" [71] The United Nations agencies and non-governmental organisations from which the applicant drew her information are without question reputable sources. The RSDO and SCRA would be justified in placing their trust in information from these sources. I see no reason, in

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[71] In terms of regulations 12(1) and 13(1) respectively.

these circumstances, for excluding the court's consideration of the information for purposes of this review.

[159] In my view, the information provided by the applicant in her affidavit establishes that the applicant is justified in harbouring a well-founded fear of persecution by reason of her race and/or tribe and/or membership of a particular social group should she be forced to return to either Ethiopia or Eritrea in accordance with the requirements of section 3(a) of the Act. The key relevant facts placed before the RSDO and the SCRA by the applicant in this regard pointed to the applicant having been caught up in the border war between Ethiopia and Eritrea by reason, not only of where her family lived, but also her mixed Eritrean and Ethiopian ethnicity. Although the respondents point to various inconsistencies in the details provided by the applicant various stages, it does not seem to me that these key relevant facts are inconsistent and implausible.

[160] The RSDO and the SCRA made their decisions without a consideration of the relevant and necessary facts. This led to the erroneous conclusion on their part that the applicant did not meet the requirements of section 3 of the Act. In the circumstances, their decisions are tainted by a material error of law. These decisions must accordingly be set aside on this basis.

[161] In view of the conclusions I have reached on the first two grounds of substantive review, it is unnecessary for me to consider the applicant's submission that the decisions of the RSDO and the SCRA are subject to review on the basis that they are otherwise unconstitutional in terms of section 6(2)(i) of PAJA. Suffice to say that once it is accepted that on the

information available from reputable sources that the applicant has a well-founded fear of persecution, it inevitably follows that the refusal of her asylum application had the effect of undermining a range of the applicant's fundamental rights including her right to citenzenship, dignity, freedom and security of the person and equality.

APPROPRIATE RELIEF: THE PRAYER FOR SUBSTITUTION

[162] For the reasons amplified above, I am satisfied that the applicant has established that she is entitled to an order reviewing and setting aside as unlawful the RSDO's decision and the SCRA's decision on the procedural and substantive grounds of review advanced by her.

[163] It remains for me to determine the appropriate relief in this case. In particular, I must decide whether this is a proper case in which to grant an order of substitution, as prayed for by the applicant, rather than to grant an order remitting the matter for reconsideration by the SCRA.

[164] Section 8(1)(c)(ii)(aa) of PAJA authorises courts to grant orders of substitution in exceptional cases. This is in line with the common law approach to remedies for judicial review, and follows from the fact that, generally speaking, administrators are best equipped because of their particular experience and sources of relevant information to make the right decision.[72] A case will be exceptional, warranting a departure from the general rule when:

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72 *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) at para 29

"upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary".[73]

[165] This determination must be "informed by the constitutional imperative that the administrative action must be lawful, reasonable and procedurally fair".[74] Fairness to both sides is an important consideration.[75] Sometimes fairness to the applicant can tilt the scale in his or her favour, and considerations of fairness may in a given case require the court to make the decision itself provided that it is able to do so.[76]

[166] The principles that are applied for purposes of determining whether a court on review can substitute its own decision for that of an administrator are well established. Substitution is appropriate where the end result is a foregone conclusion; it would be a waste of time to remit the decision to the administrator; further delay would cause unjustifiable prejudice to the applicant; and the administrator has exhibited bias or incompetence to such a degree that it would be unfair to ask the applicant to submit to its

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73 *Gauteng Gambling Board v Silverstar Development Ltd*, above, at 75E-F

74 *Gauteng Gambling Board v Silverstar Development Ltd*, above, para 28

75 *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) at paras 14-15; *Gauteng Gambling Board v Silver Star Development Ltd and* Others, above, para 28; and *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 75H - 77C

76 *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd and Another* [2013] 1 All SA 526 (SCA) at para 44

jurisdiction again. Of course, the court should be in a position practically to make the decision.[77]

[167] After oral argument was heard in this matter, I invited counsel for both parties to make further written representations to me on the question of whether an order of substitution was justified. In particular, I drew both counsels' attention to a written submission made by Mr Bofilatos SC in his heads of argument that were submitted to both the court and counsel for the applicant the night before the hearing. The submission was as follows:

> "In concluding, it is therefore clear that the Applicant cannot reply (rely?) upon any of the review grounds which she sets out in her affidavit. Indeed, it is respectfully submitted that to even to (sic) refer this matter back to the Standing Committee will probably serve no purpose when regard is had to all the information and documentation contained herein, which will be placed before the Standing Committee. The discrepancies are multiple and material. The Standing Committee is thus highly unlikely to amend its stance regarding the correctness of the RSDO's decision." (emphasis added)

[168] I invited both counsel to make short written submissions on the impact, if any, that the submission quoted above may have on my discretion to grant an appropriate remedy, particularly on my power to grant an order of substitution rather than a remittal of the matter to the SCRA.

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77 See, generally, *Tantoush v Refugee Appeal Board & Others*, above, at para 126

[169] In response to the invitation I received written submissions from Ms Jugroop-Dayand on behalf of the applicant.

[170] I have carefully considered the question of whether an order of substitution is justified in the present case and have reached the conclusion that the existence of exceptional circumstances warrants this relief. My conclusion is based on the considerations that follow.

[171] In the first instance, I cannot ignore the fact that the attitude of the respondents in this case is characterised throughout by an intractable belief that the RSDO and the SCRA were fully entitled to reject the applicant's application, and that there is no basis for justifying a different conclusion. This attitude is displayed throughout the Chairperson's affidavit filed on behalf of the respondents. It is to be expected of the Chairperson that in his attitude to a review application of this nature he should demonstrate the characteristics of non-bias and independence demanded of the body he heads. Unfortunately, he fails to measure up to this expectation. His opposing affidavit is replete with hearsay evidence, unsubstantiated denials of facts highly personal to the applicant and about which he cannot possibly have knowledge, accusations of untruths on the part of the applicant, and remarks about her allegations concerning sexual abuse that are gratuitous and derogatory. This attitude is not consistent with the need for a humanitarian approach to refugees identified in the OAU Convention.

[172] In the judgment of *Tantoush v Refugee Appeal Board & Others*,[78] Murphy J highlighted that it is inherently problematic for adjudicative functionaries under the Act, like the Refugee Appeal Board and the SCRA, to advance strenuous opposition in review proceedings on behalf of the Department. He pointed out that this compromises the statutorily designated independence of these bodies and may contribute to a reasonable apprehension of bias. The following dictum from the judgment in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*,[79] cited by Murphy J, makes the point as follows:

> "It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of rule 53 of the Uniform Rules of Court by making available the record of its proceedings and its reasons and such other documentation as the Court may need to adjudicate upon the matter and, if necessary, to file an affidavit setting out the circumstances under which the decision was arrived at. It seems, however, unusual to me that an independent tribunal such as the Tender Board should file such comprehensive and lengthy papers and offer such stringent opposition by employing senior counsel and the like to argue their case. . . . Regrettably this attitude of the Board in this case may well be to some extent support for a suggestion that they are not entirely independent and disinterested."

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78 Above, at para 87

79 1999 (1) SA 324 (Ck) at 353F - I

[173] The strenuous opposition mounted by the respondents in this case, represented by the Chairperson of the SCRA, raises exactly these concerns. The submission by their counsel to the effect there is no point in remitting the applicant's case to the SCRA as it is very unlikely to change its view is entirely in keeping with the approach adopted by the respondents in their answering affidavit. This adds force to the concern that the SCRA is not a disinterested party, which would be willing and able to reconsider the applicant's application with a truly open and independent mind if it were remitted to it.

[174] In the circumstances, it seems to me that considerations of fairness warrant an order from this court substituting the decision to refuse the applicant's asylum application.

[175] In addition, there is the question of delay. The RSDO originally refused the applicant's application in November 2009. The SCRA's decision upholding the refusal was provided to the applicant in February 2011. While there was some delay in the applicant instituting review proceedings, the fact remains that almost five years have elapsed since the RSDO's decision. If the matter is remitted back to the SCRA, the history of the case suggests that there will be a further lengthy delay before the SCRA finalises the matter. In the interim, the applicant's status will remain uncertain, and she will be denied the rights and privileges that attach to someone who has been granted refugee status.

[176] There is a further material consideration in this regard. It is not only the applicant who will be adversely affected by any further delay, but also her

daughter. She is five-and-a-half years old, and is dependent on the applicant. According to the applicant, her irregular status has prejudiced her daughter, who remains undocumented and stateless. The question of what relief is appropriate in this review is an issue that necessarily involves the applicant's minor daughter and her own fundamental rights. Section 28(3) of the Constitution provides that: "A child's best interests are of paramount importance in every matter concerning the child." I am accordingly enjoined to consider the best interests of the applicant's minor daughter as an issue of paramount importance in determining appropriate relief. It goes without saying that any further delay in determining the applicant's asylum status would be severely detrimental to the interests of the applicant's daughter. For this reason, too, I am of the view that an order of substitution, as opposed to a remittal of the matter to the SCRA, is warranted.

[177] Finally, I am satisfied that this court is in a position to make a determination on the applicant's eligibility for refugee status under section 3 of the Act. I am mindful of the inconsistencies in the details that appear from various versions of the applicant's representations. However, as I have indicated, sight should not be lost of the fact that poor translation, and other shortcomings in the application process, have played a part in this. As I pointed out earlier, the key relevant facts relied on by the applicant are clearly established: she originates from the region of Tigray on the border between Ethiopia and Eritrea; her native language is Tigrinya rather than, Amharic, the dominant language of Ethiopia; she is of mixed ethnic parentage with her mother being of Eritrean ethnicity; Ethiopians of mixed ethnic parentage like the applicant were, and remain, vulnerable to various

forms of discrimination and human rights abuses stemming from the original conflict between the two countries at the end of the 1990's and early 2000's.

[178] Based on these facts and with reference to the country information provided by the applicant, I find that the applicant's fear is well-founded that, were she be required to return to either Ethiopia or Eritrea, she could face persecution on the basis of her race, nationality, or membership of her particular social group and, for this reason, either is unable or unwilling to avail herself of the protection of either of these countries.

[179] In the circumstances, I am satisfied that the applicant is entitled to a declaration that she is a refugee eligible to refugee status in terms of section 3 of the Act, and that the circumstances of this case warrant the grant of such relief by way of an order of substitution under section 8(1)(c)(2)(aa) of PAJA.

ORDER

[180] I make the following order:

1. The prescribed period for the institution of the review proceedings under the above case number is extended in terms of section 9(1)(b) of PAJA to 5 February 2013.

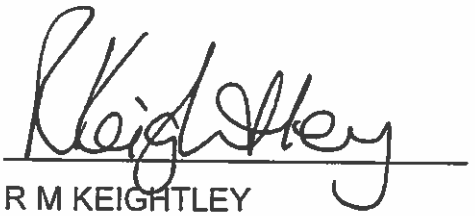
2. The decision of the third respondent taken on 11 November 2009 wherein the applicant's application for asylum was rejected as manifestly unfounded is declared to be unlawful and invalid, and is hereby reviewed and set aside.

3. The decision of the fourth respondent, which was taken on 20 September 2010 and provided to the applicant on 23 February 2011, and which upheld the third respondent's aforementioned decision, is declared to be unlawful and invalid, and is hereby reviewed and set aside.

4. It is declared that the applicant qualifies for refugee status in terms of section 3 of the Refugees Act 130 of 1998, and is entitled to the rights attendant on her refugee status.

5. The applicant's file is to be transferred from the Durban Refugee Reception Office to the Tshwane Interim Refugee Reception Centre and all necessary permits are to be issued or re-issued from the latter office.

6. The respondents are directed to pay the costs of the applicant on a party and party basis.



R M KEIGHTLEY
ACTING JUDGE,
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING:	9 MAY 2014
DATE OF JUDGMENT:	14 AUGUST 2014
APPLICANTS' COUNSEL:	U DAYANAND-JUGROOP
INSTRUCTED BY:	LAWYERS FOR HUMAN RIGHTS
RESPONDENTS' COUNSEL:	G BOFILATOS SC
INSTRUCTED BY:	THE STATE ATTORNEY, PRETORIA