Republic of South Africa

REFUGEE APPEAL BOARD

3rd Floor, Pretmed Building, 317 – 319 Pretorius Street, Pretoria.
Private Bag X 500, Pretoria. 0001
Tel : +27 12 392-1010 (International) (012) 392-1010 (Local)
Fax : +27 12 392-1059 (International) (012) 392-1059 (Local)

Address all correspondence to the Registrar

DECISION

This is an application for the re-opening and/or re-hearing and reconsideration of an appeal heard by the Refugee Appeal Board on 6 April 2001 at Pretoria. For ease of reference the Applicant/Appellant will be referred to hereunder as the Appellant.

INTRODUCTION

The Appellant is a single male aged XX years and a citizen of Ethiopia. He arrived in South Africa clandestinely by road via Swaziland on or about XXXXXX 2000. He lodged an application for refugee status and was interviewed by a Refugee Reception Officer on XXXXXXX 2000. The application was declined and the Appellant was informed by letter on XXXXXXXXX 2000. From that decision the Appellant appealed to the Refugee Appeal Board ("the Board").

The appeal was heard by the Board on XXXXXXI 2001. The Board dismissed the appeal and this decision was conveyed to the Appellant by letter dated XXXXXXXXXXX 2001.

The reasons for the Board's decision are contained in the said letter and are repeated in the present application on page 8.

From the aforegoing it is clear that the Board heard the appeal, rendered a decision and that this decision was conveyed to the Appellant.

The application now brought by the Appellant contains certain submission on page 9, paragraphs 34, 35, 36 and 37, which relate to the reasons for the dismissal of the appeal. It is the Board's contention that the said reasons have no bearing on the application now being decided.

The central issue raised by this application is whether the Board has the authority to re-open, re-hear and /or to consider an appeal which was concluded after a full appeal hearing.

WHETHER THERE IS JURISDICTION TO RE-OPEN, RE-HEAR AND/OR RECONSIDER

In order to decide this, the following is of importance.

The Refugee Appeal Board was established by section 12(1) of the Refugees Act. No. 130 of 1998. In terms of section 14 of the Act the Board has been given certain power and duties which are, *inter alia*, to hear and determine any appeal lodged in terms of the Act. According to section 14(2) the Board may determine its own practice and make its own rules. Section 14(3) stipulates that the rules made by the Board **must** be published in the Gazette (meaning the Government Gazette). The word "must" used in this section is indicative of the necessity of publication before the rule can have any legal power or effect.

Referring to the application, page 11 and further, it must be emphasized that the Board's rules, and in particular rule 19, have not to date hereof been published in terms of section 14(3) of the Act. As stated *supra*, publication of the rules in the Government Gazette is a prerequisite before any legal consequences can be attached to them.

Rule 19 quoted by Counsel on page 12 of this application was merely a suggested rule and has no legal power attached to it as it stands. In view thereof Counsel's submission that "the power of the Board to determine its practice includes the power (to) reconsider and correct its earlier mistake does not convince the Board.

The Board accepts Counsel's submission that it should be noted that there is no provision in the Refugees Act, 1998, and/or the Regulations made in terms of section 38 of the Act, that specifically preclude or prohibit the Board from reconsidering its own decisions and correcting its earlier decisions. This, however, does not mean that the Board is automatically empowered to re-open, re-hear and/or reconsider appeal cases whenever it sees fit to do so.

In the absence of formally binding rules and/or regulations redress must be had to the principles of administrative law.

Baxter, Administrative Law (1984), p.372 states: *"When an administrative official has made a decision which bears directly upon the individual's interest, it is said that the decision-maker has discharged his office or is* ***functus officio****."*

In **De Freitas v Somerset West Municipality** 1997 (3) SA 1080 (C) at 1082, it was said that a person to whom statutory power has been entrusted is ***functus officio*** once he has exercised it and he cannot himself call his own decision in question. See **also Sicebi Justice Zulu and Others v Duduzile Majola**, Case 467/2000, Supreme Court of Appeal of SA.

It was held in **Thompson trading as Maharaj & Sons v Chief Constable, Durban**, 1965 (4) SA 662 (D), that a decision made by mistake did not allow the decision-maker to alter the decision. At p.668D it is stated: *"The general rule is that,* ***in the absence of special statutory provisions****, once a judicial or quasi-judicial decision has been given, the Court or officer giving it is* ***functus officio*** *in respect of the matter to which it relates*." This case was quoted and accepted as the correct position in the matter **Carlson Investment Shareblock (Pty) Ltd. V Commissioner, South African Revenue Service**, 2000 (3) SA 310 (WLD).

The **Constitutional Court of South Africa**, Case No CCT 11/01, made the following comment: "…*if a matter is resolved by way of mediation or negotiation, as envisaged in sub clause (5), it is unimaginable how the Committee can be empowered to 'reverse an act, or rectify an omission' because it can only be the functionary upon whom a particular power is conferred who can reverse or rectify any step taken by him or her, subject, of course, to the fact that he or she is not* ***functus officio*** *in relation to the exercise of such power."*

South African law clearly does not favour the implication of a power to re-open, re-hear and/or reconsider refugee claims. This is consistent with overseas case law and to illustrate this, the following cases are mentioned.

In **Refugee Appeal No. 59/91 Re R** (New Zealand Refugee Status Appeal Authority) application was made to re-open a case on the grounds that the Appellant was in receipt of new evidence. The Authority stated that the power to make a "*final determination on appeal*" as to refugee status was held to be an adjudicative function and concluded that it was ***functus officio*** once a decision had been given.

In **Refugee Appeal No. 70387/97 Re MSI** it was argued that a re-hearing could be ordered if the findings of fact made by the Authority at the appeal hearing were erroneous by reason of being based on a fundamental misunderstanding of the Appellant's evidence. Reliance was placed on the fact that the Terms of Reference provided that the Authority could regulate its own procedure and conduct hearings in such manner as it thought fit. The Authority stated that it could not re-hear a case on the basis that at the first hearing the Appellant's evidence

was misunderstood, and concluded that it was ***functus officio***.

In **Refugee Appeal No. 71864/00** the central issue raised was whether the Authority had jurisdiction to re-hear an appeal after a full hearing and a decision. A provision in the various Terms of References used by the Authority is quite clear from this case, namely: *"…that a decision by the Authority shall not be reconsidered by the Authority once conveyed to the Appellant."* Furthermore, the Authority found it "*relevant to record that the only other circumstance, apart from non-appearance cases, in which the Authority has found jurisdiction to re-open a case is where the Authority delivers a decision in ignorance of the fact that subsequent to the hearing, further evidence and submissions have been filed but not seen by the decision-maker."* The conclusion of the Authority was …***"that this Authority has no power to re-hear a case after a full initial hearing, and after a decision has been delivered."***

The above-mentioned decisions by the New Zealand Refugee Status Appeal Authority are confirmed by the Australian case of **MIMA v Bhardway [2002] HCA 11.** This case makes it clear that the Australia Refugee Review Tribunal is not ***functus officio*** in circumstances where a jurisdictional error has occurred which results in the task of the Tribunal remaining unperformed. The judgment does not give an exhaustive list of the relevant kinds of jurisdictional errors. What must be considered is whether the error has effectively resulted in the Tribunal failing to complete its statutory task. The decision, however, makes it clear that the Tribunal cannot re-open a decision because of errors within jurisdiction such as factual errors, or where the decision-maker has changed his mind or where there has been a change of circumstances. Accordingly *"the Tribunal is not* ***functus officio*** *where the 'decision' is affected by a jurisdictional error which involves the failure to comply with a requirement which can be characterized as a failure to exercise jurisdiction such that the Tribunal's task is not yet completed."*

In **Chandler v Alberta Association of Architects** [1989] 2 SCR848 at 861 – 862 it was held that subject to a power to correct a slip or an error of expression, a tribunal cannot revisit its own decision because (i) it has changed its mind, or (ii) recognizes that it has made an error within jurisdiction, or (iii) there has been a change of circumstances, and that the tribunal cannot revisit its decision on the basis of new information received after the decision has been made.

Regarding the submission contained in the application, p.9, it is the Board's contention that it need not reply thereto but that it is for the High Court in judicial review proceedings to decide upon as to whether the Board applied its mind to the facts of the appeal or not. While the Board is without any doubt under an obligation to observe the principles or natural justice, the remedy for any failure to discharge this obligation is for judicial review proceedings to be

taken in the High Court.

CONCLUSION

The Board finds that it has no jurisdiction to re-open, re-hear and/or to reconsider and appeal after a full hearing has taken place and a decision has been conveyed to the Appellant. In view of this finding the application is dismissed.