IN THE HIGH COURT OF SOUTH AFRICA
(Transvaal Provincial Division)

Case No: 16491/06

Date: 4/4/2007

In the matter between

ICARDO MAYONGO, Applicant

against

THE REFUGEE APPEAL BOARD, First Respondent
THE MINISTER OF HOME AFFAIRS, Second Respondent
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS, Third Respondent

---

JUDGMENT

PATEL J:

[1] This is an application to review the decision of the Refugee Appeal Board ("the RAB") and/or to review the decision of the Minister of Home affairs ("the Minister "). The RAB dismissed the applicant's appeal against a decision of the refugee status determination officer, refusing the applicant refugee status. The Minister refused an application in terms of section 31(2)(b) Act 13 of 2002, the Immigration Act ("the Immigration Act "), by the applicant, for permanent residence in the country.

[2] This is a matter of great importance for both the applicant and the respondents. It is to some extent *res nova*. I reserved judgment. I asked the parties for supplementary heads of argument, which they kindly furnished, and did some comparative law research. I planned to write a comprehensive judgment but unfortunately it is at present not possible for me to do so. In order for the parties to have finality and as I have a clear view of what I want to do in this matter, I am going to give the order after stating the reasons for it very succinctly.

[3] The appellant is an adult male national of Angola. He was not a member of any political party. His father was a member of UNITA but changed his alliance to the MPLA. UNITA members killed his father and he and an uncle of his were forced to consume parts of the cooked remains of the body. They were then living in Benguella. He

was a self-employed mechanic. He reported the incident to the police but they refused to believe his story. He moved to Lubango, where he stayed for about three years with his wife and children. He bought and sold goods for a living. He received information that members of the MPLA wanted to kill him as they thought that he was collaborating with the rebels. He was arrested by the military police to do military service on 20 November 2001 and taken to a place to do military training. He escaped, on 22 November 2001, and fled to South Africa. He arrived in Durban on 28 November 2001. He left his wife and children behind and has lost contact with them. He knows that the war in Angola is over but still fears harm to himself from people who threatened to kill him because of what his father had done to their families. Medical and psychological evidence indicate that he suffers from Post Traumatic Stress Syndrome with Major Depressive Disorder and Bereavement because of what has happened to him in Angola. He receives medication and the medical opinion is that his condition may deteriorate if he is compelled to go back to Angola.

[4] The applicant applied for refugee status in terms of section 21 of Act 130 of 1998, the Refugee Act ("*the Refugee Act*") shortly after his arrival in the country. The refugee status determination officer rejected the application. The applicant appealed to the RAB against that decision. The appeal met with a similar fate. It was suggested to the applicant, by an official, that he was to apply to the Minister for permanent residence in terms of section 31(2)(b) of the Immigration Act. The Minister rejected the application. There were considerable delays before the decision was made known to the applicant. The reason for the delays is given as the great number of similar applications which are to be entertained by the authorities. The applicant maintains that if his application for refugee status had been dealt with within 180 days as the Refugee Act requires he would have been able to rely on the provisions of sections 5(1)(e) and 5(2) as a special circumstance in terms of section 31(2)(b) of the Immigration Act in his quest for permanent residence. The two sections read as follows:

> "*5(1) A person ceases to qualify for refugee status for the purposes of this Act if:*
> *(a) […]*
> *(b) […]*
> *(c) […]*
> *(d) […]*
> *(e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his nationality because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.*
> *(2) Subsection 1(e) does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.*"

[5] The RAB's decision is formulated as follows: The applicant's personal circumstances are sketched. Section 3 of the Refugee Act is quoted under the heading "The Law". It is stated that the burden of proof is on the applicant to prove refugee status, and that the

standard thereof is that there must be a "real risk" in the relevant circumstances relating both to past and future conditions. The finding of the RAB was that it accepted that the applicant was compelled to leave Angola. It took into account that circumstances have changed in Angola and referred to the death of Jonas Savimbi, that UNITA scrapped its armed wing, that the minister of defence proclaimed that the war has ended, that the United Nations did not renew its UNMA mandate, that there was a large scale return of refugees to Angola, that the United Nations High Commissioner for Refugees launched an organized voluntary repatriation of refugees to Angola and that it no longer advised against involuntary return of rejected asylum seekers and it rejected the applicants fear of being assassinated. The fact that the applicant is suffering from Post Traumatic Stress Syndrome was dealt with in the following manner:

> "*The Board takes note that Appellant is receiving treatment for trauma and although the Board is very sympathetic regarding this claim it must be pointed out that the Refugees Act No 130 of 1998 makes no provision for granting asylum on humanitarian grounds.*"

The conclusion was that the applicant had no well-founded fear as contemplated in section 3(a)[1], was not compelled to leave his habitual place of residence as contemplated in section 3(b) and did not fall under 3(c).

[6] The reasoning of the Minister, when dealing with the application for permanent residence, was that officially there is peace in Angola, that all his arguments are also applicable to a claim for asylum, that there is compulsory military service in many countries and that his reliance on Post Traumatic Stress Syndrome and Major Depressive Disorder must be seen against a background that many people who fled Angola may have experienced negative psychological effects. The Minister then accepted that she could not grant the application as it would amount to her overruling the RAB.

[7] The State has the right to control the entry of aliens into its territory. Once an alien has entered the country the State is obliged under international law to respect such alien's basic human rights in its treatment of the person. An alien who is inside the country is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens: *Dawood, Shalabi and Thomas v Minister of Home Affairs*[2].

---

[1] Section 3 reads: "3 *Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person*

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe religion, nationality, political opinion or membership of a particular social group, is *outside the country of his or her nationality and* is *unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence* is *unable or, owing to such fear, unwilling to return to it; or*

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

[2] 2000 (1) SA 997 (C).

[8] According to the UNHCR handbook a person is a refugee as soon as he/she fulfils the criteria contained in the definition. That takes place before he/she applies for refugee status. Recognition of refugee status does not make the person a refugee but only declares that he/she is one. "*He does not become a refugee because of recognition, but is recognized because he is a refugee*." I agree fully with that approach. The RAB accepted that he was compelled to flee Angola. It follows that he was a refugee at the time.

[9] When the RAB dealt with the appeal it did not consider the impact of sections 5(1)(e) and 5(2) because the applicant never officially obtained refugee status. In that respect it made a basic error of law. It was in law compelled to determine whether the Post Traumatic Stress Syndrome and Major Depressive Disorder constituted a compelling reason to refuse to avail himself of the protection of the Angolan Government. The medical and psychological evidence indicated that it did. The reasoning of the RAB was therefore fatally flawed. Moreover, accepting that economically the situation in Angola has become stabilized, it is clear that the applicant needs medical and psychological treatment for his condition. He receives such medication and treatment in this country. There is no indication that such medication and treatment will be available in Angola.

[10] Although it is not often done, a court may in special circumstances substitute the decision of the tribunal which is under review with its own. In my view this is a case where the court must do so. The applicant has now been living in a state of uncertainty for more than five years, mainly due to departmental delays. The available evidence made the correct decision a foregone conclusion. If the position changes at a later stage the applicant may lose his refugee status in terms of section 5 of the Refugee Act.

[11] In view of my decision in respect of the application for refugee status it has become unnecessary to deal with the review of the Minister's decision when she refused permanent residence to the applicant. I am of the view that the Minister wrongly failed to consider the application. It was a different application from the original application for refugee status. The approval of the application would not have, either directly or indirectly, been an overruling or setting aside of the RAB's decision.

I make the following order:

(1) The decision of the Refugees Appeal Board of 4 May 2004, when it rejected the applicant's appeal against the decision of the Refugee Status Determination Officer refusing him refugee status, is inconsistent with the Constitution and is set aside.

(2) It is declared that compelling reasons exist, justifying the applicant's recognition as a refugee as contemplated by section 3 of the Refugee Act and he is granted asylum in terms of section 24(3)(a) of the Refugee Act.

(3) The second and third respondents are directed forthwith to issue the applicant with the necessary documents in terms of section 27 of the Refugee Act giving recognition to his refugee status.

(4) The respondents are ordered, jointly and severally the one paying the other to be absolved, to pay the applicant's costs, which costs are to be taxed upon the basis that the applicant was entitled to employ a senior advocate, and are to include the costs of the supplementary heads of argument.

EM PATEL
JUDGE OF THE HIGH COURT

Representation

For Applicant:
Advocate A A Louw SC
Attorneys: Lawyers for Human Rights, Pretoria Law Clinic

For the Respondents:
Adv. L M Moloisane, The State Attorney.