

IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 17170/2006

DATE: 21/9/2007

NOT REPORTABLE

IN THE MATTER BETWEEN

PIERRE CLEMENT FELIX EYAMBAT LUMUMBA

APPLICANT

AND

THE REFUGEE APPEAL BOARD

1ST RESPONDENT

TJERK DAMSTRA N.O.

2ND RESPONDENT

THE MINISTER OF HOME AFFAIRS

3RD RESPONDENT

THE DIRECTOR-GENERAL: HOME AFFAIRS

4TH RESPONDENT

REFUGEE DETERMINATION OFFICER

5TH RESPONDENT

THE STANDING COMMITTEE FOR REFUGEE AFFAIRS

6TH RESPONDENT

JUDGMENT

SERITI, J

1. INTRODUCTION

This is an application which was brought to court by way of motion.

In the notice of motion, the applicant is praying for an order in the following

terms:

- 1.1 declaring that the decision of the Refugee Appeal Board rejecting the applicant's appeal against the decision of the Refugee Status Determination Officer, in which his application for refugee status and asylum was denied, is inconsistent with the Constitution 1996 and is unlawful and invalid;

1.2 reviewing and setting aside the decision of the Appeal Board rejecting the applicant's appeal against the decision of the Refugee Status Determination Officer;

1.3 declaring that the decision of the Refugee Status Determination Officer rejecting the applicant's application for refugee status was inconsistent with the Constitution, unlawful and invalid;

1.4 reviewing and setting aside the decision of the Refugee Status Determination Officer rejecting the applicant's application for refugee status and asylum;

1.5 declaring that the applicant is a refugee who is entitled to asylum in South Africa as contemplated by sections 2 and 3 of the Refugees Act 130 of 1998.

2. FOUNDING AFFIDAVIT

It was attested to by Mr P C F E Lumumba. He alleges that he is a male asylum seeker and a national of the Democratic Republic of Congo ("DRC") and residing at Centurion. He is currently unemployed. He is a foreigner in South Africa and if he is not permitted to remain in South Africa he will be forced to return to "DRC".

He has applied for refugee status and asylum in South Africa but his application was rejected.

He was born on 27 April 1968 at Poto-Poto, Congo Brazzaville while his parents were in exile. Both his parents are deceased.

Before going into exile, his father was the leader of the Pati Ouvrier ET Paysan political group during 1961. He was a well known and respected member of the government under President Lumumba. When President Lumumba was killed his father went into exile in 1963 at Brazzaville, Republic of Congo, where he was born.

During 1990 President Mobutu called for all refugees to return to the "DRC". His family returned to Kinshasha, "DRC" where they resided with family members. His parents were divorced and his mother remained in Congo Brazzaville where she passed away in 1991. On their arrival in the "DRC" his father went to meet the minister of defence in order to reclaim his properties which were taken from him before he went into exile, as the minister of defence was dealing with claims of expropriated properties of people who went into exile. The minister of defence informed his father that he must first meet President Mobutu before he could reclaim his property.

His father refused to meet President Mobutu as he could not understand the reason for doing so. Besides that, he was afraid to meet President Mobutu because other members of his party who did so were murdered or disappeared.

His father was a friend to Mr Laurent Kabila, who started a civil war against President Mobutu in 1997. President Mobutu was aware of the friendship between his father and Mr Laurent Kabila. The vice prime minister informed his father that his life was in danger because of his friendship with Mr Laurent Kabila.

Together with his father, they went back to Republic of Congo Brazzaville as they feared for their lives.

Mr Laurent Kabila became president of the "DRC" at a later stage.

During June 1997 war began in Congo, Brazzaville and he returned with his father to "DRC" in September of that year. A friend to his father gave them accommodation. When the new vice minister of defence found out their whereabouts, he placed a guard at their house. His reasons for doing so were that he was afraid that Mr Kabila will replace him with his father because of their relationship, he did not want them to have contact with Mr Kabila and lastly he wanted to control their movements.

His father died in February 1998 and Mr Joseph Kabila, who was chief of security, ordered him to remove all his belongings immediately. Mr Joseph Kabila had knowledge about his family situation and at that stage he participated in the persecution of his family.

He contacted President Laurent Kabila and explained his dilemma to him, and the president, as he was on his way to China, promised him he will resolve his problem when he returns home. He informed Mr Joseph Kabila about his discussions with the president but Mr Joseph Kabila insisted that he must leave the house where he (the deponent) was staying. Mr Joseph Kabila was very hostile towards him.

He left the house in question and went to stay with his uncle. He was informed that the vice minister of defence wanted to harm him and he went into hiding and went to stay with his father's friend. The vice minister of defence sent soldiers to his uncle's place to arrest him, but they could not find him. When he was informed about that fact he feared for his life. He then went to Lubumbashi where he stayed with relatives of his father's friend.

At a later stage his father's friend informed him that it was not safe for him to stay in Lubumbashi as they do not know who would give the vice minister of defence information about his whereabouts and it was suggested that it is better if he leaves the country. He believed then and still believes that his life was seriously threatened. He then went to Lusaka and from there came to South Africa on or about January 1999.

He further alleges that in the "DRC" there is a cultural trend to confer all political allegiances of the patriarch of the family onto all members of the family. He was harassed because of an imputed political opinion and because immutable characteristic (being the son of his father) which he could not change. His family was targeted by various factions of Mr Laurent Kabila's government and in particular he was harassed by Mr Joseph Kabila and the members of the defence force. Mr Joseph Kabila, one of the people who were persecuting him, is now the president of the "DRC".

On arrival in South Africa he approached the department of home affairs to make an application for asylum. He was issued with an asylum seekers permit in terms of section 22 of the Refugees Act. He based his claim on a well founded fear of persecution on the basis of an imputed political opinion and additionally on events seriously disturbing public order existing in "DRC" which compelled him to leave and which put him at risk of generalised violence.

He had two interviews with the members of the department of home affairs concerning his application for asylum. During these interviews he encountered significant difficulties in presenting his story to the officials.

His first difficulty was language. He was not provided with a translator and he was forced to pay a certain man to translate for him. He does not know the level of that man's proficiency in English, and he is of the view that the said man did not accurately relay the questions to him or his answers accurately to his interviewer.

In the second interview he did not have a translator even though his English was poor. At the said interview he was unable to fully understand everything that was asked from him and had difficulty relaying his testimony.

The abovementioned difficulties were compounded by the perfunctory nature of the two interviews that made up his initial application. Well aware of his language difficulties his interviewers did not take time to try to understand his full story. Instead they asked him a list of questions, wrote down the answers, without trying to understand that he was trying to give full context of his background. They did not try to determine whether he actually understood the questions or not.

In May 2005 he received a letter from the Refugee Status Determination Officer rejecting his application, on the basis that he did not evidence a well founded fear of persecution and because significant changes had occurred in "DRC" rendering it safe for him to return home.

He was given thirty days during which to appeal the decision or leave the country. On the same date his asylum seeker's permit was revoked. This procedure followed by the Refugee Status Determination Officer is not reasonable or rational and must be set aside. He lodged an appeal with the Refugee Appeal Board. He based his appeal on the ground that he had a well founded fear of persecution because of imputed political opinion and in addition he grounded his claim for refugee status on the fact that he was fleeing events

seriously disturbing public order in the "DRC" that entitled him to be a refugee.

His appeal also focused on the fact that the peace process in "DRC" could not be seen to constitute significant changed country conditions.

As part of the appeal process he was interviewed by a member of the Refugee Appeal Board, and on 15 November 2005 the Appeal Board dismissed his appeal. He was not informed prior to the taking of the decision of the possible reasons for rejection of his appeal and he was not provided with an opportunity to rebut the reasons through oral or written representations.

His participation in the appeal process was limited to the submission of heads of argument prior to the appeal interview which addressed his objections to the decision of the Refugee Status Determination Officer and to the responses the interviewer (re: appeal) elicited from him through a standard questionnaire form that the interviewer completed during the interview.

In upholding the decision of the Refugee Status Determination Officer the Appeal Board found that he did not have a well founded fear of persecution on the basis of a political opinion and that he fled his country simply because of a personal conflict between his family and the minister of defence.

In addition the Board found that an internal flight alternative existed that he could have utilised.

The last two-mentioned reasons were never put to him in his hearing.

The Appeal Board's decision was served on him on 3 January 2006. At that time his asylum permit was revoked and he was issued with a letter indicating that he has thirty days within which to leave the country.

He has resided continuously in South Africa since his arrival in 1999. He is unemployed.

He seeks to remain in South Africa mainly because he is extremely afraid of being forced to return to the "DRC". He is aware that the violence that he fled from continues throughout the "DRC" including the Kalanga province. Furthermore, he believes that he will be particularly vulnerable if forced to return to "DRC" because he has no immediate family in the "DRC" as most are in other countries as refugees. His closest friends are in the main seeking refugee status in South Africa.

He further states the grounds of review as the following:

- (a) The decision of the Appeal Board was taken without affording him a fair hearing on the matter.

The decision of the Appeal Board was taken without providing him with adequate opportunity to make representations to the Appeal Board on the findings of the appeal interview.

The Refugee Status Determination Officer rejected his claim based on a fear of political persecution under section 3(a) of the Refugee Act. This rejection was based on the fact that on 29 September 2003 the government of the "DRC" issued a decree that permitted persons in opposition politics to operate legally and by implication indicated that the civil war had ended. Consequently, the heads of argument that he submitted were largely concerned with rebutting this claim in the context of section 3(a), although the heads of argument made it clear that he was basing his claim on both section 3(a) and (b). The Appeal Board found reasons to reject his claim both in terms of section 3(a) and (b). The heads of argument he submitted were deficient with respect to section 3(b). At no stage in the appeal process prior to his receipt of the letter of rejection from the Appeal Board was he given notice that the Appeal Board would reject his application on this additional ground. Neither was he given a reasonable opportunity to make representation in relation to section 3(b) of the Refugees Act.

Had he been given notice that the Appeal Board will take into account section 3(b) of the Refugees Act, and had he been given an opportunity to

make submissions in that regard, his application would have been decided differently. This impact directly on his right to procedurally fair administrative action and the decision of the Appeal Board falls to be set aside for this reason alone.

- (b) The decision of the Appeal Board was materially influenced by errors of law.

There was a material error of law regarding the standard of risk necessary to find a well-founded fear.

The Appeal Board applied the "real risk test" instead of applying the "reasonable possibility of risk test". The latter test is far less exacting than the former test applied by the Appeal Board.

The test applied by the Appeal Board regarding the level of risk necessary to find a well-founded fear constituted an error of law and that its decision was materially influenced by this error of law and falls to be set aside for this reason alone.

- (c) There was a material error of law regarding the application of the internal flight alternative principle.

- (d) The decision of the Appeal Board was not rationally connected to the information before it.

The Appeal Board erred when evaluating the likelihood of his persecution because of his and imputed political profile.

From reports of non-governmental organisations and the media it is clear that there was and there is still unrest in many parts of the country as contemplated by

section 3(b) of the Refugees Act. At the time of his departure and currently, political opponents are still at risk of persecution.

Evidence shows that there was instability in a large part of the country at the time of his departure and that the said instability still persists today. Members of the opposition are still being persecuted.

The Appeal Board found that his political profile was such that it was not different to the government and neither could it be said that it was not tolerated by the government. This is incorrect because neither his father nor he was directly a member of the ruling party. His father was a member of the POP and only returned to the "DRC" when Mr Laurent Kabila, his father's friend, assumed power. His political profile is inherently linked to his father's profile, given his family's involvement in the POP and his surname. His political profile therefore reflects not only his political activities but also his father's political involvement.

Lastly, there are significant factions within the ruling party and these factions deliberately targeted and persecuted him, and the said factions are currently the strongest forces in power in the "DRC" and Mr Joseph Kabila himself is currently the president of the "DRC".

Certain government agencies were his persecutors and other members of the government whom he turned to for help were unwilling and unable to protect him.

He referred to various reports and articles pointing out that the situation in the "DRC" is still very dangerous. The said reports refer also to rampant abuse of human rights, killing of innocent civilians by both government forces and other combatants and the failure of the government to hold credible elections timeously.

He also refers to another report which states that the instability in the country which is a danger to civilian lives is partly because of the failure of the "DRC" government to create a unified army. The "DRC" government is said to be offering inadequate protection to its civilians while its military action is hampering the efforts of humanitarian agencies with the result that thousands of people are losing their lives due to starvation, violence and preventable diseases.

3. SUPPLEMENTARY AFFIDAVIT

It was attested to by the applicant. This was prepared after receipt of the record of the proceedings was dispatched to the registrar of this court by the respondents.

He alleges that the record is incomplete and inaccurate in certain respects. The Refugee

Status Determination Officer stated, in his decision, that amongst others, he considered the "UK Immigration and Nationality Directorate Country Information" document, but the said document does not form part of the record. The respondents filed a notice of intention to defend through the same attorney. This raises a concern about the independence of the first and sixth respondents.

It is difficult to understand how the Standing Committee and the Refugee Appeal Board can function independently and without bias and yet instruct the same attorneys to represent them together with the other respondents.

He further alleges that a potential conflict of interest exists between, on the one hand, the Refugee Appeal Board, the Standing Committee, the Refugee Status Determination Officer and on the other hand the minister and/or director-general.

It is inappropriate that an "independent" tribunal such as the Refugee Appeal Board should oppose this application on any basis. Their opposition to this application is an indication of lack of independence.

The Refugee Appeal Board does not give any reason why it finds that he has no political links in the "DRC".

The Refugee Appeal Board's decision appears not to have taken into account any of the evidence placed before it particularly evidence relating to the current country conditions in the "DRC".

4. FIRST AND SECOND RESPONDENT'S ANSWERING AFFIDAVIT

It was attested to by Mr Tjerk Damstra, the second respondent, who is in the employment of the Refugee Appeal Board. He is currently the acting chairperson of the Refugee Appeal Board.

He alleges that he admits that the Appeal Board dismissed the applicant's appeal on the grounds that he failed to demonstrate that he had a well-founded fear of persecution should he return to the "DRC" as contemplated in section 3(a) of the Refugees Act, nor that he was compelled to leave his habitual place of residence owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in the "DRC" as contemplated in section 3(b) of the Refugees Act.

On the facts available before the Appeal Board, the applicant failed to meet the criteria for granting of refugee status and asylum as envisaged in section 3 of the Refugees Act.

The applicant was afforded a fair hearing when he appeared at the appeal hearing, in that he was notified of the date of the hearing of the appeal and of his right to be accompanied

by an interpreter as well as legal representative, by means of set down dated 16 May 2005. The applicant was indeed assisted by an interpreter that he brought along at the hearing together with a legal representative.

The Appeal Board's decision to dismiss the applicant's appeal and to confirm the decision of the Refugee Status Determination Officer was not influenced by error of law as the grounds for the decision were clearly consistent with the law. The decision arrived at was rationally connected to the information furnished by the applicant.

The applicant failed to prove on a balance of probabilities that he had a well-founded fear of being persecuted by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group. In fact, the information presented to the Appeal Board indicates that the applicant did not express any particular political opinion nor have any political profile in as far as the politics of the "DRC" are concerned.

Furthermore, the applicant did not demonstrate, on a balance of probabilities, that he was compelled to leave his habitual place of residence in order to seek refuge in South Africa owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order either in part or the whole of his country of origin or nationality. In fact, the applicant's basis for leaving the "DRC" and seeking asylum in South Africa was due to problems between him, by virtue of his father's close relationship with Mr Laurent Kabila, and the vice minister of defence of the "DRC".

When he appeared at the appeal hearing the applicant was asked by Mr Mohale as to what would happen to him if he were to go back to Lubumbashi, and his response was that he does not have a relative in Lubumbashi. From this response it is clear that if he had relatives in Lubumbashi he would have returned to Lubumbashi.

When completing the "Eligibility Determination Form", in response to a question as to whether he would face any particular danger to his safety if he were to return to the "DRC", the applicant stated that he could be killed because he was the one who was making investigation about the death of his father.

The above answer indicates that he did not fear persecution by reason of his political opinion or owing to external aggression. The applicant is not consistent on the question of reasons which made him to leave the "DRC".

At the appeal hearing he stated that he could not return to Lubumbashi as he did not have relatives there, and in the "Eligibility Determination Form" he stated that he was afraid of being killed if he returned to the "DRC" as he was the one making investigation about the death of his father.

Furthermore, the applicant failed to disclose any reason, before the Refugee Status Determination Officer and at the appeal hearing, as to why the vice minister of defence would want to harm him when he did not hold or express any political opinion against him or the government.

Applicant stated for the first time in his founding affidavit that his family was targeted by various factions of Mr Laurent Kabila's government and that in particular he was harassed by Mr Joseph Kabila and the members of the defence section of government. This indicates that applicant is inconsistent on the facts that made him to leave the "DRC".

The information presented before the Refugee Status Determination Officer and the appeal hearing, the applicant never stated that he was harassed by Mr Joseph Kabila and the members of the defence section of the government. He stated that Rwandan and Ugandan soldiers held him and his father hostage at their house as they had knowledge of his father's friendship with Mr Laurent Kabila.

He denies that the applicant had any language difficulties when he was interviewed, as he had his own interpreter when interviewed by the Refugee Status Determination Officer. After receiving the Refugee Status Determination Officer's decision the applicant did not challenge the correctness of the facts relayed to the Refugee Status Determination Officer by his interpreter when he appealed the decision before the Appeal Board, as the information was correctly captured.

The narration of the applicant to the officials as to how and why together with his father returned from the Congo Brazzaville is the same as these presented to his legal representatives as contained in their heads of argument presented at the appeal hearing, and that is an indication that he had no language problems nor interpretation problems. The applicant did have an internal flight alternative and his only reason of not wanting to go back to Lubumbashi was that he did not have a relative in Lubumbashi.

The applicant's case before the Refugee Status Determination Officer and at the appeal hearing was not based on the fact that he fled violence that continues throughout the "DRC" nor on the fact that he will be vulnerable if forced to return to the "DRC" he has no immediate family there as most of them are in other countries as refugees and that his closest friends are in South Africa seeking refugee status. His case was that he had a well founded fear of persecution in the "DRC".

The applicant did not leave his country because of the conditions in his country of origin, but left because of the conduct of and/or relationship between him and the vice minister of defence. Furthermore, he was never persecuted in Lubumbashi but left because he received information that the vice minister of defence wanted to harm him, and not because there were human right violations in the "DRC".

He denies that there is any conflict if the respondents are represented by the same attorney.

5. APPLICANT'S REPLYING AFFIDAVIT

It was attested to by the applicant. He denies that he did not express any

particular political opinion or have any particular political profile in so far as the politics of the "DRC" are concerned.

He further alleges that in his founding affidavit he set out in detail his family connections in the political arena and the role that his family played in the general political landscape of the "DRC". As a member of his family he was immediately and actively associated with such political opinion.

The fact that the respondents acknowledge his father's close relationship with Mr Laurent Kabila and the vice minister of defence of the "DRC" is indicative of the fact that they are aware of his political profile.

He further alleges that despite the fact mentioned above, the Appeal Board ignored the obvious political implications of Mr Joseph Kabila's coming into power and the potential danger and threat that poses to his continued residence in the "DRC".

He admits that when asked what would happen to him if he were to go back to Lubumbashi, his response was that he did not have a relative in Lubumbashi. In addition to that he explained that he went to reside in Lubumbashi temporarily, awaiting peace in Kinshasha. He was not going to stay there permanently and also do not have any family members there. His father's friend told him that he was not safe in Lubumbashi and that is when he left.

He further alleges that he explained to the Appeal Board and the Refugee Status Determination Officer that there was great animosity between his father and the minister of defence. He felt that the cause of his father's death was related to the fact that he was placed under house arrest under the instructions of the minister of defence. He therefore felt that it was necessary to voice this concern to other members of government to expose the conduct of the minister of defence. He felt that the minister of defence was threatened by him because of his relationship with his father and his political association with him. This constitutes imputed political opinion.

He denies that he did not have language difficulties.

In the first interview he had a translator whose proficiency in English is unknown to him. In the second interview he did not have a translator although his English was poor. The mere fact that he was related to his father and associated with his political objectives constituted a political profile and rendered him vulnerable to persecution by reason of his political opinion.

He denies that the "DRC" is a country with significant changed country conditions sufficient to satisfy the requirements of internal refugee law and therefore to justify the rejection of his asylum application.

6. FINDINGS

Section 3 of the Refugees Act 130 of 1998 reads as follows:

"3. Refugee status. – 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 ..."

In the "Eligibility Determination Form" it is stated that the applicant's father died at hospital as a result of heart attack.

During the appeal oral hearing applicant stated that in February 1998 his father collapsed at home at night. They took him to hospital. He was in a coma for a week and he then died. In the founding affidavit applicant stated that his father suffered from high blood pressure and due to the circumstances they found themselves in he was extremely stressed. That caused him to go into a coma and he passed away a week later during February 1998.

During the completion of the "Eligibility Determination Form" applicant said that if he can go back to his country, he will be killed because he is the one who was investigating his father's death. I am unable to understand what he was investigating about his father's death as his father died as a result of a heart attack.

In the "Eligibility Determination Form" the applicant stated that, after the late President Laurent Kabila took over, they were kept hostage in their house for six months. There is no explanation why they were kept hostage as, according to him, his father was a friend to the late President Laurent Kabila.

When at Lubumbashi he was called by Prof Munene who informed him that he (the applicant) is in trouble, he should leave the country, he left the country and came to South Africa.

There is no explanation why he was in danger and who was likely to hurt him.

In the founding affidavit it appears that the person who was likely to hurt him was the vice minister of defence. One of the reasons he gave for their harassment by the vice minister of defence was mainly that the vice minister of defence was afraid that Mr Kabila will replace him with his father. As his father had died by the time he (the applicant) left his country it is not understandable why the vice minister of defence still posed a threat to him.

During oral argument the applicant's counsel submitted that in cases of this nature credibility of the applicant does not come into the equation.

The said submission cannot be sustained. In order to determine the true reasons why the applicant left his country it is necessary to assess the allegations of the applicant for refugee status whether they are true or not – see *Fang v Refugee Appeal Board and Others* 2007 2 SA 447 (TPD) at 456F-H. If the credibility of the applicant does not come into question then it means that an applicant will be able to come with all sorts of allegations and the authorities will be expected to assume that the said allegations are correct even if they do not make sense at all.

My view is that the applicant has failed to demonstrate that he left his country because of a well founded fear of being persecuted nor that he was in danger of being harmed in his own country as required by section 3 of the Refugees Act, *supra*.

In the heads of argument the applicant's counsel submitted that they do not seek the review of the decision of the Refugee Status Determination Officer, but they seek review of the decision of the Refugee Appeal Board.

It was further submitted on behalf of the applicant that the Refugee Appeal Board breached the *audi alteram* principle by not allowing the applicant to comment on the recommendations of Mr Mohale who heard the representations of the applicant, and on

this ground alone the decision of the Refugee Appeal Board should be set aside.

On the basis of the information that the applicant supplied to the authorities my view is that, even if the applicant had commented on the recommendations of Mr Mohale, the results would have been the same. There is no possibility that he could have persuaded the Refugee Appeal Board that he is entitled to refugee status.

The applicant's counsel also raised the point that the Refugee Appeal Board, when determining the refugee status of the applicant, applied the "real risk" test instead of the correct test being the "reasonable degree" test.

On the available evidence, even if the correct test was applied, the results would not have been different.

Another point raised on behalf of the applicant is that the Refugee Appeal Board erred by accepting that the situation in the "DRC" was stable and did not pose a threat to the applicant should he return to the "DRC".

In the evidence that the applicant gave to the authorities his main reason for leaving the "DRC" was the alleged persecution by the vice minister of defence. The country conditions as such were never mentioned as the reason for his having left the "DRC". The only reason that he gave for leaving Lubumbashi is that he was told that he is not safe in Lubumbashi. Applicant did not give details of why he was not safe in Lubumbashi and who will want to hurt him nor the reason why he will be hurt. It is just a bold statement that he was told that he is not safe in Lubumbashi.

He was not compelled to leave the "DRC" because of the disturbance of the public order.

In *SA Veterinary Council v Veterinary Defence Association* 2003 4 SA 546 (SCA) at p556H-I, paragraph 40, FARLAM JA said:

"In view of the fact that it is clear that the tribunal adopted an erroneous approach to the matter the proceedings can be saved only if it is clear that despite the irregularity Dr Krawitz was not prejudiced because the finding would have been the same if the correct approach had been applied: cf *Le Roux and Another v Grigg Spall* 1946 AD 244 at 254."

In *Cooper v First National Bank of SA Ltd* 2001 3 SA 705 (SCA) at 734H-I paragraph 50, while dealing with a case where the *audi alteram* principle was not

observed, MARAIS JA said *inter alia*:

"The decision will only be vitiated if in fact the failure to afford the opportunity did amount to a failure of justice in the circumstances of the particular case in the sense that an opportunity to say something which could conceivably have brought about a different result was denied."

The submission by applicant's counsel that the alleged misdirections committed by the Refugee Appeal Board in themselves vitiate the proceedings of the Refugee Appeal Board cannot be sustained. Even if the alleged irregularities were not committed, the outcome of the appeal would have been the same.

I therefore make the following order:

- (1) The application is dismissed.
- (2) The applicant is ordered to pay the respondents' costs.

W L SERITI
JUDGE OF THE HIGH COURT

17170-2006

HEARD ON:
FOR THE APPLICANT:
INSTRUCTED BY:
FOR THE RESPONDENTS:

INSTRUCTED BY: