AOL v MINISTER OF HOME AFFAIRS AND OTHERS 2006 (2) SA 8 (D)

Citation	2006 (2) SA 8 (D)
Case No	6501/2004
Court	Durban and Coast Local Division
Judge	Swain J
Heard	October 22, 2004
Judgment	October 28
Counsel	S Magardie for the applicant. R Singh for the respondents.
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Immigration - Refugee - Refugee Appeal Board - Proceedings of - To be conducted in accordance with principles of administrative fairness - Appellant against refusal of application for refugee status not given notice of hearing of appeal nor furnished with document upon which Appeal Board subsequently based its decision to G refuse appeal - Appellant denied fair hearing and decision of Appeal Board falling to be reviewed and set aside.

Immigration - Refugee - Application for refugee status - Refusal of - Review of on ground of non-compliance with provisions of s 24 of Refugees Act 130 H of 1998 - No evidence that decision to refuse application for refugee status taken by Refugee Status Determination Officer as required by s 24 - Decision set aside on review.

Headnote : Kopnota

The applicant had fled from Uganda to South Africa, where she had applied for refugee status under the Refugees Act 130 of 1998. Two I years later she was informed by the Department of Home Affairs, by letter, that her application had been unsuccessful. She indicated that she wished to appeal against the Department's decision and was called to appear before a member of the Refugee Appeal Board for a preliminary investigation into her position. A further two years later she was notified that the Appeal Board had refused her appeal on the basis of information contained in a document styled the 'United Kingdom Country Information and Policy Unit - April 2003 - J

Uganda Assessment'. The applicant then launched the A present application for the review and setting aside of the Appeal Board's decision to refuse her appeal. The Court *mero motu* raised the questions (1) whether the application proceedings had complied with the provisions of s 24 of the Act and (2) whether the appeal proceedings had been conducted in accordance with the principles of administrative fairness.

Held, that it did not appear from the letter from the B Department in which the applicant was informed that her application for refugee status had been unsuccessful that the decision to refuse her application had been made by a Refugee Status Determination Officer (RSDO) who, in terms of s 24 of the Act, was the only person authorised to make such a decision. (At 12A - H.)

Held, further, that there was no evidence on the papers to C show that the decision had been taken by a RSDO, which was fatal to the jurisdiction of the Appeal Board to hear the applicant's appeal. (At 12H - I.)

Held, further, that the provisions of s 26(4) of the Act implied that the applicant was entitled to be present at the hearing of her appeal and that she was entitled to be given notice of the hearing in order to be able to request and arrange legal representation at the hearing. (At 13D - E.) D
Held, further, that no notice had, however, been given to the applicant of the appeal hearing and that was fatal to the proceedings of the Appeal Board. (At 13E/F.)
Held, further, that the applicant had not been furnished with a copy of the 'United Kingdom Country Information and Policy Unit - April 2003 - Uganda Assessment' E (which was prejudicial to her application), or given an opportunity to deal with the contents of the document before the Appeal Board took its decision. It was clear that an individual had to be furnished with all information that was prejudicial to his or her case before a decision was taken. (At 13I - J.)
Held, further, that that issue was also fatal to the Appeal Board's decision. (At 14E.) F
Held, further, that the decision of the Appeal Board thus fell to be reviewed and set aside on the ground that the applicant's right to a fair hearing had been denied her. (At 14E/F and 15A.)
Held, accordingly, that the decision to refuse the applicant's application for refugee status fell to be reviewed and set aside. (At 15A/B.) G

Cases Considered

Annotations

Reported cases

Kotze v Minister of Health 1996 (3) BCLR 417 (T): applied.

Statutes Considered

Statutes

The Refugees Act 130 of 1998, ss 24, 26: see H *Juta's Statutes of South Africa 2002* vol 5 at 2-48.

Case Information

Application for the review and setting aside of a decision of the Refugee Appeal Board. The facts appear from the reasons for judgment.

S Magardie for the applicant.

R Singh for the respondents. I

Cur adv vult.

Postea (October 28).

Judgment

Swain J:

The applicant in this matter fled from Uganda because of the civil unrest in that country and made her way via Tanzania and J

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Mozambique to the Republic, where she arrived in Durban on 2 February 2000. On 8 February 2000 she reported to A the Durban office of the Department of Home Affairs, where she applied for refugee status in accordance with the provisions of the Refugees Act 130 of 1998 (hereafter referred to as the 'Act'). She was interviewed by an individual whom it is common cause was a duly appointed Refugee Status Determination Officer in terms of s 8(2) of B the Act.

Some two years later on 18 January 2002 she was advised that her application had been refused when she went to the Department of Home Affairs offices in Durban. She was issued with a letter on the Department of Home Affairs letterhead setting out the reasons for such refusal, and advising her to appeal against the decision in terms of C s 26 of the Act, within 30 days of receipt of the letter. The letter in question appears as annexure A to the applicant's founding affidavit. She advised the official concerned that she wished to

appeal against the decision and thereafter was given forms which she completed in order to do so. She was then given a form which advised her, *inter alia*, that because she had lodged an appeal she was D requested to make a personal appearance at the Durban regional office on 18 February 2002. She was also advised that she was entitled to legal representation at the hearing.

The date was, at the request of the applicant, adjourned to 20 February 2002, on which date she was interviewed by one Marobe who told her that she was a member of the Appeal Board and had come to E hear her appeal. The said Marobe told her that it was her last chance to tell the truth about her asylum claim and that she would write down everything she told her, for the purpose of submitting this evidence to the Appeal Board.

On 23 March 2004 the applicant was advised that the Appeal Board had refused her appeal and was handed a document which she was told was F the decision of the Appeal Board. A copy of that document was put up as annexure F to the applicant's founding affidavit. The applicant was also handed a letter by the regional representative of the Department of Home Affairs advising her that she had 30 days within which to leave the Republic. At the same time the official demanded the return of her temporary asylum seeker permit. G

As a result of this the applicant launched the present application and, as a matter of urgency, obtained an interim order in terms of which, pending the finalisation of the present proceedings, the first and second respondents were interdicted from depriving the applicant of her liberty and/or removing her from the Republic, and directing the first and second respondents to issue the applicant H with an appropriate permit in terms of the Act.

The applicant attacks the decision of the Appeal Board on the grounds that the hearing before the said Marobe did not constitute a hearing before a properly constituted quorum of the Appeal Board, being the fourth respondent. In addition the applicant contends that reg 13(3) of the fourth respondent's rules, which authorises the third I respondent, as Chairman of the fourth respondent, to designate one or more members of the Appeal Board to hear any appeals, should be declared invalid and of no force and effect. The applicant also attacks the merits of the J

decision, alleging that the fourth respondent failed to take decision, alleging that the fourth respondent failed to take into account A relevant considerations, and took into account irrelevant ones in coming to its decision.

The response of the third respondent, who opposed the proceedings in his capacity as Chairman of the Appeal Board, was to aver that the hearing the applicant had been afforded before Marobe was not the B appeal hearing, but purely the exercise by the fourth respondent of its power in terms of s 26(3)*(d)* of the Act — 'of its own accord [to] make further enquiries or investigation'. In addition the third respondent disavowed any reliance upon the provisions of reg 13(3), pointing out that the regulation had not been promulgated when what the third respondent referred to as the appeal hearing had been held on 24 February 2004. The third respondent averred that the Appeal C Board had heard the appeal constituted of a full quorum of four members.

As regards the merits of the application, the third respondent averred that the appeal failed because the applicant had failed to discharge the *onus* of entitlement to refugee status, being that of a real risk to the applicant if she returned to her homeland. The third respondent in addition averred that the applicant had D failed to give a suitable explanation as to why she could not go to Kampala, or one of the protected villages in Uganda to escape persecution. The fourth respondent had come to this conclusion, as is apparent from the written decision of fourth respondent, on the basis of information contained in a document styled the 'United Kingdom Country Information and Policy Unit - April E 2003 - Uganda Assessment'.

At the hearing I advised Mr *Magardie* that, in the light of the third respondent's disavowal of any reliance upon the provisions of reg 13(3) and in the light of its promulgation after the decision by the Appeal Board, a declaration of its invalidity was irrelevant to the determination of the present application. F

I also advised counsel that in my view there were three aspects to the application, not raised by counsel, which were of relevance. These were:

1. Whether, in the light of the contents of annexure A to the applicant's founding affidavit, a decision had ever been taken by the relevant refugee status determination officer (hereafter referred to as G RSDO) to refuse the applicant's application and if not, whether the Appeal Board therefore had jurisdiction to hear the appeal in terms of s 26(2) of the Act?
2. Assuming that the hearing afforded to the applicant was purely an enquiry or investigation by the fourth respondent of its own accord in terms of s 26(3)*(d)* of the Act, whether the H applicant was ever given any notice of the actual appeal hearing by the third or fourth respondents, and if not, whether the decision could stand?
3. Whether the fourth respondent was obliged to bring to the attention of the applicant, the prejudicial information contained in the said United Kingdom Country Information and Policy Unit Report and I to afford the applicant an opportunity to deal with this information before making a formal decision?

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As regards the issue of whether the RSDO had ever given a decision on the application, s 8(2) of the Act provides for the A appointment of RSDOs who must be officers of the Department of Home Affairs. Section 24 of the Act provides that a decision regarding an application for asylum must be taken by the RSDO and s 24(3) provides for the possible decisions that may be taken by the RSDO. B

If the RSDO rejects the application on the ground that it is 'unfounded' in terms of s 24(3)*(c)* of the Act, the applicant is then entitled to appeal the decision to the Appeal Board in terms of s 26(1). The Appeal Board is then empowered to confirm, set aside, or substitute any such decision. It is therefore clear that a necessary jurisdictional requirement C for the Appeal Board to hear such an appeal is that the RSDO rejected the application as D 'unfounded' in terms of s 24(3)*(c)*. If the RSDO rejected the application as 'manifestly unfounded, abusive or fraudulent' in terms of s 24(3)*(b)* of the Act, the applicant in contrast enjoys a right of automatic review of the decision by the standing committee in terms of s 25 of the Act. The basis upon which the RSDO rejects the application is therefore material in determining what E rights of appeal, or automatic review, an applicant thereafter possesses.

When annexure A to the applicant's founding affidavit is examined, being the initial decision refusing the applicant's application, although setting out the grounds for the decision, is totally silent as to whether the application is rejected in accordance with the criteria set out in s 24(3)*(b)* or 24(3)*(c)* of the Act. It is therefore impossible on the face of the decision itself to determine whether it was a decision that was amenable to appeal. I will assume, however, that the decision was taken in terms of s 24(3)*(c)* because the letter advises the applicant of her right of appeal in terms of s 26 of the Act. F

It is common cause that the applicant was interviewed by a RSDO at the Durban regional office of the Department of Home Affairs. After an unexplained delay of two years the applicant was notified by way of annexure A of the rejection of her application. The notification is on the letterhead of the Department of Home Affairs and signed by an G unidentified person on behalf of the Director-General of this Department. It states 'the Department of Home Affairs has come to the conclusion that your claim does not meet the refugee definition'. On the face of it the decision was taken by the Department and there is no evidence to indicate that the decision was taken by a RSDO, being the only person authorised to take such a decision in terms of the Act. H

When I raised this issue with Ms *Singh*, who appeared for the third respondent, she fairly conceded that there was no evidence on the papers to show that the decision had been taken by a RSDO, which is fatal to the jurisdiction of the Appeal Board to hear the appeal of the applicant.

Turning to the second issue, as pointed out above, the applicant I contends that the audience before Marobe was the appeal hearing, whereas the third respondent contends that this was purely a preliminary enquiry or investigation, with the appeal hearing having been held at a

later stage. I must say I have serious reservations about the notice given to the applicant to make a personal appearance before the Appeal Board, being annexure B to applicant's founding affidavit, being consistent with J

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what was purely a preliminary investigation. Be that as it may, I will assume without deciding in A favour of the respondent that this was the case. The issue that then arises is what notice the applicant was given of the actual appeal hearing. There is no evidence of any notice being given to the applicant of the hearing. A cornerstone of the *audi alteram partem* rule is that an individual is granted a proper opportunity to present his case. Baxter *Administrative Law* at 545. B

Except where legislation prescribes otherwise, administrative bodies are at liberty to adopt whatever procedure is deemed appropriate, provided this does not defeat the purpose of the empowering legislation and provided that it is fair. The issue is whether the affected individual is entitled to be present at, and make representations to the Board in question. Although s 26(3)*(e)* provides that C the Appeal Board has the power to require the applicant to appear before it and provide information, this does not in itself provide a right to the applicant to do so. Section 26(4) however provides as follows:

> 'The Appeal Board must allow legal representation upon the request of the applicant.' D

This provision in my view, carries two necessary implications:

1. The applicant is entitled to be present at the hearing. If not, why would provision be made for an entitlement to be legally represented at the hearing? E
2. The applicant must be given notice of the hearing to be able to request and arrange legal representation at the hearing.

When I put this aspect to Ms *Singh* she again fairly conceded that no notice was given to the applicant of the appeal hearing, and that this would be fatal to the proceedings of the Appeal Board. F

Turning to the third issue. It is quite clear that the basis for the decision of the fourth respondent was a report by the United Kingdom Country Information and Policy Unit - April 2003 - Uganda Assessment, that attacks by LPA rebels caused many people to leave their homes for urban centres, internally displaced persons' camps and guarded villages. It stated that about half of, *inter alia*, the Kitgum district population were in G IDP camps or protected villages. It appears the applicant comes from the Kitgum district. On this information, together with information from the United Nations Office of the Co-ordinator for Humanitarian Affairs that Government forces maintained so-called protected villages, the Appeal Board did not accept the appellant's explanation as to why H she did not go to Kampala, or the protected villages. The Appeal Board then found that the appellant had an internal protection alternative available to her, in that she could avoid any localised trouble by living in Kampala or one of the protected villages. I

The applicant was not, however, given any opportunity to deal with this evidence, which was prejudicial to the applicant's application, before taking its decision. It is clear that an individual should be furnished with all information prejudicial to his case before a decision is taken. *Baxter (supra*) at 554.

In addition in *Kotze v Minister of Health* 1996 (3) BCLR 417 (T) it was J

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held that the Director-General's consideration of information which did not form part of the applicant's application, A amounted to a denial of procedurally fair administrative action. The applicant should have been given an opportunity to deal with any information which did not form part of his application, and which was later taken into account when considering the application. Burns *Administrative Law under the 1996 Constitution* at 172. B

This principle is of particular significance on the facts of this application, because the legal representatives of the applicant have obtained a copy of the United Kingdom Country

Information and Policy Unit Report from which it is clear that in para 6.54, following the paragraph relied upon by the Appeal Board, the following is stated: C

> 'Despite substantial NGO and donor community assistance, conditions worsened due to increased LRA activity in the north. The Government failed to provide adequate security to the protected villages or IDP camps, which were the targets of large-scale rebel attacks.'

This allegation is not denied by the third respondent. Obviously if the portion relied upon by the Appeal Board had been furnished to D the applicant before a decision was taken, the applicant would have been given the opportunity to bring to the attention of the Appeal Board the relevant passage which I have quoted above.

Ms *Singh* again fairly and properly conceded that this issue was also fatal to the Appeal Board decision. E

The decision of the fourth respondent cannot therefore stand, the right of the applicant to a fair hearing having been denied. In addition the initial decision purportedly taken by the Director-General of the Department of Home Affairs, being the second respondent, also cannot stand and falls to be reviewed and set aside in accordance with this Court's inherent jurisdiction. F

In order for the applicant's rights to be protected the second respondent will have to afford to the applicant a fresh hearing before a duly authorised RSDO, to reconsider the applicant's application for refugee status. G

There is therefore no object in referring the matter back to the fourth respondent, being the Refugee Appeal Board, for reconsideration, when it lacks the jurisdiction to hear any appeal on the initial decision taken in this matter in the first place.

Before setting out the order I propose to make in this case, something has to be said about the inordinate delay in dealing with the applicant's application. No reasons have been advanced on the papers H by either the first or second respondents as to the inordinate delay in processing the applicant's application. It is apparent that the applicant had to wait some two years before an initial decision was taken on her application; and a further two years before the Appeal I Board handed down its decision on her appeal. Particularly in the context of where an applicant seeks finality in regard to her status as a refugee, it is unacceptable that there should be such a long delay. There seems to me to be no conceivable reason why there should be such an excessive delay in dealing with the applicant's application.

The order I make is therefore the following: J

(A) The decision of the fourth respondent to dismiss the applicant's appeal for refugee status in terms of the Refugees Act A 130 of 1998 is hereby reviewed and set aside.

(B) The decision of the second respondent dismissing the applicant's application for refugee status as contained in annexure 'A' to the applicant's founding affidavit is hereby reviewed and set aside. B

(C) The second respondent is directed to ensure that the applicant is afforded the opportunity of re-applying for refugee status, before a duly appointed Refugee Status Determination Officer, within 30 days of this order.

(D) In the interim and pending the outcome of the decision of the refugee status determination officer, referred to in para (C) of this C order:

(i) the first and second respondents are interdicted from depriving the applicant of her liberty and/or removing her from the Republic of South Africa and

(ii) the first and second respondents are directed to ensure that the permit issued to the applicant in terms of the Immigration Act D 13 of 2002, as ordered in terms of the order of this Court dated 27 May 2004 remains valid, pending the decision of the Refugee Status Determination Officer referred to in para (C) of this order.

(E) The third respondent is ordered to pay the applicant's costs. E

Applicant's Attorney instructed by: *Legal Resources Centre*; *Xulu Inc*. Respondents' Attorneys: *State Attorney*. F

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* See s 26 before its substitution by s 54(1) of the Immigration Act 13 of 2002 - Eds.

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