**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 27367/2016**

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED:

In the matter between:

| | |
|---|---|
| **C[....] E** | First Applicant |
| **E[....] E** | Second Applicant |
| **V[....] E** | Third Applicant |
| **A[....] E** | Fourth Applicant |
| **P[....] E**<br>**(DULY ASSISTED BY HIS LEGAL GUARDIAN E[....] E)** | Fifth Applicant |
| **K[....] E**<br>**(DULY ASSISTED BY HER LEGAL GUARDIAN E[....] E)** | Sixth Applicant |
| **M[....] E**<br>**(DULY ASSISTED BY HER LEGAL GUARDIAN E[....] E)** | Seventh Applicant |

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| **E[....]2 PRINCE KABWE**<br>**(DULY ASSISTED BY HER LEGAL GUARDIAN V[....]**<br>**E)** | Eighth Applicant |
| **A[....]2 TUSIMBANA**<br>**(DULY ASSISTED BY HER LEGAL GUARDIAN**<br>**A[....] E)** | Ninth Applicant |

and

| | |
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| **THE MINISTER OF HOME AFFAIRS** | First Respondent |
| **CHAIRPERSON OF THE REFUGEE APPEAL BOARD** | Second Respondent |
| **THE REFUGEE STATUS DETERMINATION OFFICER** | Third Respondent |
| **THE DIRECTOR–GENERAL OF THE DEPARTMENT OF HOME AFFAIRS** | Fourth Respondent |
| **THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS** | Fifth Respondent |
| **MANAGER OF THE REFUGEE RECEPTION OFFICE, MARABASTAD, PRETORIA** | Sixth Respondent |

**Coram:** Fourie AJ

**Heard on**: 5 August 2021

**Delivered: 11 October 2021**

**Summary: Promotion of Administrative Justice Act 3 of 2000. Review of decisions by Refugee Status Determination Officer and Refugee Appeal Board, refusing asylum application. Application of existing principles to the facts. The principle of family unity, contained in applicable UN Conventions and given effect to in legislation, does not require separate asylum applications by individual family members. Impugned decisions set aside and referred back to the decision-makers.**

**JUDGMENT**

Introduction

1. This is an application, brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), in which the applicants seek to review and set aside the decisions of the third respondent, the Refugee Status Determination Officer ("RSDO") to decline their asylum application, and the refusal of their appeal by the second respondent, the chair of the Refugee Appeal Board ("RAB").

2. The second to ninth applicants ("the applicants"), Mrs E[....] E ("E[....]") , her children (and their subsequent offspring), were not cited as parties in the original review application. The first applicant, Mr C[....] E ("C[....]"), the head of the E family, brought the review application, but did not prosecute it, and has abandoned his family.

3. The applicants then applied to join in the review proceedings, so as to continue to prosecute it. In the joinder application the following applicants sought to be joined to the main application:

3.1. E[....] as the second applicant;

3.2. V[....] E ("V[....]") as the third applicant;

3.3. A[....] E ("A[....]") as the fourth applicant;

3.4. P[....] E ("P[....]") as the fifth applicant;

3.5. K[....] E ("K[....]") as the sixth applicant;

3.6. M[....] E ("M[....]") as the seventh applicant;

3.7. E[....]2 Prince Kabwe ("E[....]2") as the eighth applicant; and

3.8. A[....]2 Tusimbana ("A[....]2") as the ninth applicant.

4. V[....], A[....], P[....], K[....] and M[....] are E[....]'s children. V[....] and A[....] are adults and P[....], K[....] and M[....] are minor children. E[....]2 and A[....]2 are E[....]'s

grandchildren. The sixth to ninth applicants were assisted by E[....], as their legal guardian.

5. The Minister opposed the joinder application, and filed an affidavit raising two legal defences: First, that the applicants lacked *locus standi* in the review proceedings as they were not party to C[....]'s initial asylum application or subsequent appeal, and secondly, that as C[....] had not prosecuted the application, any subsequent order would have no practical effect. In essence this is the same point as the first.

6. On 6 August 2019, Wanless AJ ordered the joinder of the applicants as co-applicants in the main review proceedings (together with ancillary relief, reinstating their asylum seeker permits pending the outcome of the main application). The applicants duly supplemented the founding papers in the review application. The respondents did not challenge this Order, and did not file answering affidavits in the main review proceedings, but did file heads of argument. At the hearing in the main review proceedings counsel for the respondents sought to argue the issues of lack of *locus standi* and mootness, despite not pleading these defences in the main application. I deal with these issue in due course.

Background

7. The second applicant ("E[....]") fled the Democratic Republic of Congo ("DRC") with her now estranged husband, the first applicant ("C[....]") and several of their minor children, and arrived in South Africa in 2004. On 6 June 2006, C[....], assisted by an informal interpreter, a bible college student, applied for refugee status, and signed an Eligibility Determination Form For Asylum Seekers, i.e. an application for asylum. This is a standard form used at the time by the Department of Home Affairs to process asylum applications.

8. In the application, C[....] described himself as married, and listed E[....] and three minor children under the "Family Details" section of the form. The reason for seeking asylum was described as follows:

> *"The applicant claims his father was killed by the present government of J Kabila, and claim because of political instability that is why he is applying*

*with his family in RSA. The applicant claim that there is political crisis in Congo".*

9. Some two years and two months later, in October 2008, the RSDO refused the application for asylum. C[....] duly lodged an appeal to the RAB, which was refused.

The legal defences raised in argument

10. The respondents argue that the applicants have no *locus standi* to prosecute the review, as they have not applied for asylum. The argument is based on the fact that only C[....] is listed as an applicant for asylum in the Eligibility Determination Form described above. The respondents assert, without producing any evidence whatsoever in support of their argument, that it was necessary for each of the individual applicants to have completed a separate application for asylum status.

11. In his application, C[....] completed the "family details" section of the form as follows:

**B. FAMILY DETAILS**

☐ MARITAL STATUS: UNMARRIED/MARRIED/DIVORCED
(Delete where applicable)

| NAME OF SPOUSE | D.O.B | NATIONALITY | WHEREABOUTS |
|---|---|---|---|
| Ecamy Emili a | [redacted] | Congolese | R. SA. |

| LIST CHILD/REN | GENDER | | | |
|---|---|---|---|---|
| 1. Ecamy V | M | [redacted] | Congolese | R. SA. |
| 2. Ecamy A | F | [redacted] | Congolese | R. SA |
| 3. Ecamy P. | M | [redacted] | Congolese | R. SA |
| 4. | | | | |

12. The children referred to are V[....], A[....] and P[....], who at the time of the application were 12 years, 9 years and six months old, respectively.

13. It beggars belief that counsel for the respondents could seriously argue that these children should have completed separate asylum application forms. This kind of nonsensical argument is not acceptable, particularly when made on behalf of the public officials responsible for the administration of the asylum seeker processes,

which directly affect the lives of tens of thousands of people. A more humane approach is required, as recently emphasised by the Supreme Court of Appeal in *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* (Case no 585/2020) [2021] ZASCA 124 (23 September 2021) ("*Somali Association*"):

> "[1] … In the case of persons who have come to our country to seek asylum and those who might ultimately qualify for refugee status, the following two quotes are apposite:
>
> "Migrants and refugees are not pawns on the chessboard of humanity. They are children, women and men who leave or who are forced to leave their homes for various reasons, who share a legitimate desire for knowing and having, but above all for being more."
>
> The renowned author, Khaled Hosseini, is reported to have said the following:
>
> "Refugees are mothers, fathers, sisters, brothers, children, with the same hopes and ambitions as us – except that a twist of fate has bound their lives to a global refugee crisis on an unprecedented scale."

14. Not only is the interpretation contended for by the respondents not supported by any factual evidence, it is also made in the absence of any supporting authorities of any kind. In their heads of argument, counsel for the applicants debunk this argument with reference to the statutory regime that applied at the time, as follows:

> "25. The now repealed section 33(1) of the Refugees Act (which applied at the time of the initial asylum application as well as the decisions of the RSDO and RAB) expressly recognised the right of C[....] to assist his dependants who travelled with him to the Republic to apply for asylum or to apply on their behalf. As a general proposition the claim of dependants to refugee status falls within the orbit of section 3(c) of the Refugees Act. That provision is designed to facilitate the principle of "family unity".

26. The now repealed regulation 16 expressly recognised that a dependant asylum seeker could be "included in the principal's [C[....]] asylum application". There was an obligation on the Refugee Reception Office ("RRO") in terms of regulation 16(2) to ensure that this "inclusion" was effected. The applicants submit that the facts set out in paragraphs 20 to 23 above sufficiently demonstrate that the RSDO and RAB accepted and treated C[....]'s application as "including" the entire family as envisaged by regulation 16."

15. I agree with these legal submissions. Furthermore, in *Somali Association,* the SCA emphasised the importance of considering applicable international conventions when dealing with asylum applications:

"[8] … In dealing with such applications, it must be emphasised, once again, that State authorities are required to ensure that constitutional values, including those that embrace international human rights standards set by international conventions and instruments in relation to those seeking asylum, adopted by South Africa, are maintained and promoted."

16. The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status[1] contains a chapter on the principle of family unity, which provides as follows:

181. Beginning with the Universal Declaration of Human Rights, which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.

182. The Final Act of the Conference that adopted the 1951 Convention:

Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

[1] Under the 1951 Convention and the 1967 Protocol relating to the status of refugees-reissued, Geneva 2011, and applied by the SCA in *Somali Association.*

Available at https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol.

184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them.

186. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to

cases where a family unit has been temporarily disrupted through the flight of one or more of its members.

187. Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees.

188. If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him." (Emphasis added)

17. The current iteration of the Refugees Act 130 of 1998 expressly provides that "*3… a person qualifies for refugee status for the purposes of this Act if that person …(c) is a spouse or dependant of a person contemplated in paragraph (a) or (b)*." This subsection (c) was introduced by way of amendment that took effect from 1 January 2020. The version of the Act that applied at the time of the application for asylum did not contain this subsection. However, even in the previous iteration of the Refugees Act and applicable regulations (as demonstrated above), and given the applicable Conventions, to which South Africa has bound itself, this argument lacked merit. In my view, at the time of the completion of the Eligibility Determination Form by C[....], there was no requirement for his wife and minor children to complete separate applications, as it was an application on behalf of the family unit, for asylum in South Africa. The applicants (excluding the sixth to ninth applicants, who were not born at the time) are mentioned in C[....]'s form as his family, and clearly their fates as asylum seekers were dependent on the outcome of C[....]'s application. Their rights are equally affected by the rejection of C[....]'s application. They accordingly have *locus standi* to prosecute this review application, even in C[....]'s absence, and the dispute is clearly not moot.

18. In the circumstances, the legal issues raised by the respondent in opposing this application have no merit. Having proffered no factual defence to the review application, I will deal with the primary grounds of review on an unopposed basis.

Condonation

19. In the first founding affidavit in the review proceedings, deposed to by C[....], he seeks condonation for failing to bring review proceedings within the requisite six-month period from date of dismissal of his appeal to the RAB. The review application was brought on 8 August 2016. The decision of the RAB is dated 26 August 2009. It appears to have been received by C[....] on 26 January 2011. Clearly the review application was brought several years out of time. Several more years have passed in the prosecution of the appeal.

20. Given that the condonation application is not opposed, the special circumstances present that warrant the hearing of this matter on the merits, the excellent prospects of success in the main application, and the fact that the rights of minor children are affected by this application; I exercise my discretion in favour of granting condonation for the late filing of the review application, and will deal with the matter on its merits.

Primary review grounds

21. There are several blatant irregularities in the processes followed by both the RSDO and the RAB, that warrant the setting aside of the decisions of both bodies. In particular:

22. The failure by both the RSDO and RAB to provide competent interpretation services, violated the Constitutional right to procedurally fair administrative action, and rendered both processes fundamentally unfair, and subject to review under PAJA. As Keightley AJ (as she then was) held in the matter of *FAM v The Minister of Home Affairs & 3 Others*[2] ("FAM") where she held as follows:

> "[101] The obligation on the part of the Department to provide competent interpretation services is an important safeguard for

[2] (6871/2013) [2014] ZAGPPHC 649 (22 August 2014). Listed on saflii.org as "M v Minister of Home Affairs and Others"

applicants in the asylum process because, by their nature, asylum seekers often speak languages foreign to South Africans. 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 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." (Emphasis added)

22.1. I agree fully with the findings and reasoning of Keightley AJ. Stated bluntly, inadequate or incompetent translation of an applicant for asylum's submissions (often involving recounting traumatic past events, in a highly stressful bureaucratic environment, where the stakes for the applicant and his or her family are incredibly high) can taint the entire asylum process with irregularity.

23. The *ultra vires* composition of the RAB. The record reflects that the RAB was constituted of a single official, Mr Mohale. This is *ultra vires* the empowering statute, Section 13(1) of the Refugees Act (which applied at the time, since repealed and replaced by section 8B):

"The Appeal Board must consist of a chairperson and at least two other members appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and

expertise and his or her capability to perform the functions of the Appeal Board properly." (Emphasis added)

23.1. A single-member appeal board is clearly irregular, and its findings stand to be set aside on review on this basis alone. This has been confirmed in several cases. See *Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 (5) SA 550 (WCC), where a decision of the RAB was set aside on identical grounds. See also *Kalisa v Chairperson, Refugee Appeal Board and Others* 2020 (4) SA 256 (WCC).

24. Other competent review grounds were pleaded and would also justify setting aside both the decisions of the RSDO and RAB. In my view it is not necessary to traverse these grounds, as I have already found that both decisions must be set aside on review.

Appropriate relief

25. The applicants seek an order remitting their application for asylum to the RSDO for a *de novo* determination. This seems to be the most appropriate relief, for the reasons set out by Binns-Ward J in *Kalisa v Chairperson, Refugee Appeal Board and Others* 2020 (4) SA 256 (WCC) at para 26-26.

Costs

26. The applicants have been ably assisted by competent legal representation, and clearly considerable resources have been deployed in salvaging the application after C[....] abandoned it. Given that the defects in the asylum process are so blatant, it is unfortunate that the respondents elected to opposing these review proceedings, on baseless grounds, without presenting factual evidence to dispute the allegations of irregularities, and despite existing case law that is exactly on point. In the circumstances, I exercise my discretion in favour of granting costs of the application to the applicants, such to include the costs of two counsel, where two counsel were engaged.

27. My order follows.

Order

1. Condonation for the late filing of the review application is granted.

2. The decision of the Second Respondent taken on 26 August 2009 under Appeal Number 1596/09 obtained against the First to Fifth Applicants in respect of File Number BRA/006576/04 is reviewed and set aside.

3. The decision of the Third Respondent dated 21 October 2008 under File Number BRA/006576/04 is reviewed and set aside.

4. The Sixth to Ninth Applicants are declared dependants under File Number BRA/006576/04 in terms of section 3(c) of the Refugee Act 130 of 1998 (the Act).

5. The application under File Number BRA/006576/04 is remitted to the Third Respondent for a *de novo* hearing.

6. The Third and Sixth Respondents are directed to periodically renew the Second to Ninth Applicants' asylum seeker permits pending the decision of the Third Respondent, and the exhaustion of all available appeal and review mechanisms, pursuant to the *de novo* hearing.

7. The Respondents are ordered jointly and severally to pay the costs of the application, including the costs of the joinder application, such costs to include the costs of two counsel, where two counsel were engaged.

*Greg Fourie*
*Acting Judge of the High Court of South Africa*
*Gauteng Local Division, Johannesburg*

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| HEARD ON: | 5 August 2021 |
| DATE OF JUDGMENT: | 11 October 2021 |
| FOR THE APPELLANT: | Adv C Picas (Heads of argument drawn by Adv P Slabbert and Adv C Picas) |
| INSTRUCTED BY: | Fasken Attorneys |
| FOR THE RESPONDENT: | Adv PP Baloyi |
| INSTRUCTED BY: | State Attorney, Johannesburg |