



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 75188/2019

- (1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER
JUDGES: YES / NO
(3) REVISED: YES / NO

14/02/2022

In the matter between:

CHRISTIAN OLIVIER NTELAMANOU

First Applicant

CLAUDIA DENISE ARISTIDE NKOUKA

Second Applicant

FREZY BENILLE EXAUCE NTELAMANOU

Third Applicant

SYNDIRE ARIOL EMMANUEL NTELAMANOU

Fourth Applicant

AND

THE STANDING COMMITTEE FOR REFUGEE AFFAIRS

First Respondent

THE CHAIRPERSON OF THE STANDING COMMITTEE

FOR REFUGEE AFFAIRS

Second Respondent

THE MINISTER OF HOME AFFAIRS

Third Respondent

THE DIRECTOR GENERAL OF THE DEPARTMENT

Fourth Respondent

OF HOME AFFAIRS

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on February 2022.

BAQWA J

Introduction

1.

The applicants seek an order for the review and setting aside of a decision of the Standing Committee for Refugee Affairs ("The SCRA") which is the first respondent together with its Chairperson, who is the second respondent, to withdraw the applicants' refugee status in terms of section 36 of the Refugees Act 130 of 1998 ("The Act").

2.

The order is sought in the following terms:

1. *"The decision of the SCRA and second respondent to withdraw the applicants' refugee status in term of section 36 of the Refugees Act 130 of 1998 is reviewed, set aside and declared to be unlawful and unconstitutional.*
2. *It is declared that the applicants qualify for the refugee status in term of section 3 of the Refugee Acts 130 of 1998 ("Refugees Act") and are entitled to the rights attendant on their refugee status.*
3. *The third and fourth respondents are directed to issue the applicants with formal written recognition of their refugee status as provided in section 27(a) of the Refugees Act read with the provisions of Regulation 15 of the Refugee Regulations (Form and Procedure),*

2000 prohibited in GN R938 in GE 21573 of 15 September 2000 ("Refugee Regulations") within 15 days of the service of this order.

- 4. In the alternative to the order in paragraph 2 and 3, the decision to withdraw the applicants' refugee status is remitted for reconsideration by the SCRA within 30 days of the order.*
- 5. The third and fourth respondents are directed to re-issue the applicants with temporary asylum permits in accordance with section 22 of the Refugees Act 130 of 1998 pending the final determination of the hearing contemplated in prayer 4 above.*
- 6. The respondents are ordered to pay the costs of the application jointly and severally".*

3.

The applicants also seek condonation for instituting the proceedings outside the 180 day period provided for the Promotion of Access to Administration Justice Act 3 of 2000 ("PAJA") and for the late filing of the supplementary affidavit and replying affidavit.

The issue

4.

Whether the SCRA's decision to withdraw the applicant's refugee status should be reviewed and set aside as unlawful and unconstitutional and if so, whether this court should substitute the SCRA's decision with its own declaring the applicants to qualify for refugee status in term of section 3 of the Act and directing the third and fourth respondent to issue the applicants with the requisite documentation recognising their status.

Background

5.

The first applicant "Ntelamanou" is married to the second applicant and the third and fourth applicants are their children:

6.

Ntlelemanou and his family fled from Congo Brazzaville allegedly fearing prosecution due to his political activism and membership of the opposition party in that country. They were granted asylum in the Republic of South Africa in 2004 after which they repeatedly renewed their refugee status.

7.

Having resided in South Africa for about five years the applicants applied for certification of their refugee status in term of section 27(c) of the Act which would entitle them to remain indefinitely in South Africa.

8.

In November 2016 the SCRA refused to grant the certification and decided to withdraw their refugee status on the ground that the circumstance which justified the granting of the refugee status no longer existed.

9.

The applicants' ground of review are:

9.1 No country specific evidence was considered by the SCRA in that it did not consider any information or documentation concerning Congo-Brazzaville.

9.2 The factors which the SCRA considered are irrelevant and not sourced in law.

9.3 The decision is procedurally unfair in that the SCRA failed to comply with its duty to gather relevant information and wrong the burden of proof was applied.

9.4 There is no rational connection between the information before the SCRA and the decision to withdraw the applicants' refugee status.

10.

The Law

Section 3 of the Act provides as follow:

"3 Refugee Status

Subjects to chapter 3, a person qualifies for refugee status for the purpose of this Act if that person.

- a) Owing to a well-founded fear of being prosecuted 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 place of habitual residence in order to seek refugee elsewhere; or*
- c) Is a dependant of a person contemplated in paragraph (a) or (b)"*

Section 3 came into effect on 1 January 2020 but is virtually identical to the section quoted above which was amended by section 4 of the Refugees Amendment Act 33 of 2008.

11.

Section 5 of the Act provides for cessation of refugee status as follows:

"5 cessation of the refugee status

- 1. A person ceases to qualify for refugee status for the purposes of this Act if-*
 - a) He or she voluntarily reavails himself or herself of the protection of the country of his or her nationality, or*

- b) *Having lost his or her nationality, he or she by some voluntary and formal act reacquires it, or*
 - c) *He or she becomes a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality; or*
 - d) *He or she voluntarily re-establishes himself or herself in the country which he or she left; or*
 - e) *He or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised 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 prosecution for refusing to avail himself or herself of the protection of the country of nationality.*
 3. *The refugee status of a person who ceases to qualify for it in term of subsection (1) may be withdrawn in terms of section 36”.*

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The new section 5 of the Act came into effect on 1 January 2020 and whilst framed in almost identical terms, section 5 (1) (h) provides:

“(h) The minister may issue an order to cease the recognition of the recognition of the refugee or category of refugees, or to revoke such status.”

The amendment was effected by section 6 of the Refugees Amendment Act 33 of 2008.

13.

The Act also provides for the withdrawal of refugee status as follows;

“Section 36 withdrawal of refugee status

1. *If a person has been recognised as a refugee erroneously on an application which contains any materially incorrect or false information, or was so*

recognised due to fraud, forgery, a false or misleading representation of a material or substantial nature in relation to the application or if such person ceased to qualify for refugee status in term of section 5-

- a) The Standing committee must inform such person of its intention of withdrawing his or her classification as refugee and the reasons therefor; and*
 - b) Such person may, within the prescribed periods, make a written submission with regards thereto.*
- 2. After consideration of all material facts and with due regards for the rights set out in section 33 of the Constitution, the Standing Committee may withdraw such recognition and such person may be dealt with as a prohibited person under The Aliens Control Act 1991.”*

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The above section was re-enacted in virtually the same terms through section 29 of the Refugees Amendment Act 33 of 2008, section 11 of the Refugees Amendment Act 12 of 2011, section 27 of Act 11 of 2017 all of which came into effect on 1 January 2020.

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The principle of non-refoulement is recognised in section 2 of the Act which provides:

“2 General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances. Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into Republic expelled, extradited or returned to any other country or be subjected to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return or remain in a country where: -

- a) He or she may be subjected to prosecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or*
- b) His or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other*

events seriously disturbing or disrupting public order in either part or the whole of that country.”

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In *Saidi and Others vs. Minister of Home Affairs and Others*¹ The Constitutional Court endorsed the protection of genuine refugees when said:

“The paramount importance of protecting genuine refugees from expulsion is highlighted in the introduction of the Refugee Convention, which says:

‘The principle of non-refoulement is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return (‘refouler’) a refugee against his or her will, in any manner whatsoever, to a territory, where he or she fears threats to life or freedom.”

Condonation

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Section 7(1) (b) of PAJA stipulates that a review application must be instituted without unreasonable delay and nor later than 180 days after the applicant became aware of the administrative actions sought to be set aside.

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Ntelamanou became aware of the decision during December 2017 yet this application was only issued during October 2019. The only explanation proffered for the two-year gap is that the applicants’ lawyer had great difficulty in obtaining relevant documents and information including the contents of the applicants’ file from their previous attorneys of record and that those documents were only availed in May 2019.

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It is trite that in instances where there has been a significant delay regarding non-compliance with section 7 (1) (b) of PAJA a facile explanation such as an inability to

¹ 2018 (4) SA 333 (CC) para 28

obtain documents where an applicant has been represented at all material times by legal representatives is not adequate. The court would have to be informed about the nature of the difficulties and the steps that were taken to overcome them.

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*In Madinda vs. Minister of Safety and Security*² the Supreme Court of Appeal said:

“Condonation is not to be had merely for the asking. A full detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and assess the responsibility. It must be obvious that, if the non-compliance is time related, then the date, duration and extent of any obstacle on which reliance is placed, must be spelled out.”

I am not satisfied that the threshold set by the SCA has been met by the applicants herein especially when taking into account that whilst the applicants’ lawyers took over the file in May 2019, the application is only lodged in October 2019. That gap in time remains unexplained.

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Analysis

It is common cause that the applicants were granted an opportunity to make submissions prior to the SCRA making its final decision which has been brought before this court for review.

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The decision which was made after the said submissions is encapsulated in the letter to attorneys Bregman Moodley from the SCRA dated 3 November 2017 contained in the Rule 53 bundle which states as follows:

“The committee considered the above mentioned and decided to withdraw your client’s refugee status in term of section 36 read with 5 (1) (e) and 5 (3) of the said Act. The committee decided that your client is no longer a refugee as the circumstances with

² 2008 (4) SA 312 (SCA).

which he was recognized as a refugee have ceased to exist and no other circumstances have arisen which justifies your client's recognition as a refugee. In your client's submissions against the withdrawal of his refugee status he refers to events in DRC but he is from Congo Brazzaville. There are no reason given why he and his dependants will remain refugees indefinitely or why his life would be at risk if he returns to Congo Brazzaville."

23.

What the SCRA says can be illustrated with reference to paragraph 10 of the applicants' submissions as follows:

The situation in the DRC continues to be unstable' and the ruling party who were the militia at the time of our client's departure from DRC would certainly have due cause to harm our clients for witnessing acts of genocide, torture and crimes against humanity which are punishable acts in International Criminal Court. It was on this very basis, as stated in Mr Christian Olivier Ntelamanou's initial application for refugee status and further applications for certification to which our client availed himself to the protection of South African Government as a refugee. Please see attached report from credible journalism sources documenting the current instability in the DRC, marked as annexure "G".

24.

The quoted submission indicates not only in that submission but that at all material times, the applicants who are from Congo-Brazzaville misled the South African government by tendering misleading evidence relating to the DRC and not the country of origin, Brazzaville. The fact that the applicants try to blame their erstwhile attorneys does not alter or amend the record of the decision sought to be reviewed and set aside.

25.

The above contents of the SCRA letter are not disputed by the applicants. They are even confirmed in a letter from The Wits Law Clinic dated 17 May 2017 in which they request the SCRA to reconsider the matter or else they would bring an application for judicial review.

26.

The respondents' stance is that the decision is not reviewable because the applicants were given an opportunity to make submissions whereupon they made submissions which were either incorrect, false or irrelevant to the matter at hand. They submit further that the submissions that applicants seek to make *ex post facto* with regard to Amnesty International reports were never part of the case presented before the SCRA.

27.

In a nutshell, this court is confined to review proceedings which took place before the SCRA and the record thereof is what is contained within the Rule 53 record. This court is not called upon to review facts which were not considered by the SACRA. In that context I am inclined to accept the submission by the respondents that such proceedings are not reviewable.

28.

In my view, the grounds for review which suggest that the SCRA acted unfairly, or that it took into consideration facts which were irrelevant or that there is no rational connection between the decision and the facts before it is in my view not sustainable.

29.

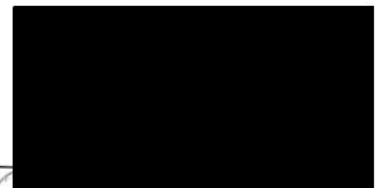
On the contrary the record seems to show that it is applicants who made incorrect, false or misleading submissions to the SCRA. To merely blame the previous legal representative for these submissions and then make *ex post facto* submissions and expect this court to review a decision which falls within the applicable legal prescripts cannot be justified.

30.

In the result, I make the following order:

30.1 The application to review and set aside the first and second respondents' decision to withdraw the applicants' refugee status in term of section 36 of the Refugees Act 130 of 1998 is dismissed.

30.2 Each party shall pay its own costs.



SELBY BAQWA

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 7 February 2022

Date of judgment: February 2022

Appearance

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